EARLY TEACHING EXPOSURE TO COMPARATIVE DIMENSIONS IN LAW AND EDUCATION

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The teaching methods and curricular sequences deployed upon lawyers while in training have always been a subject of vigorous controversy, yet the quality of training provided is high and the practitioners so trained are accorded high prestige in professional life. The teaching modes for classroom teachers are less controversial; yet the results of training are often criticized and the teaching profession does not occupy as lofty a position on the occupational totem pole as it merits. There must be several and complex reasons for this disparity—beyond the hapless wonder why society should think the education of its children less important than its litigations. For one thing, to lawyers is given the vigilant guardianship of constitutional protections without which our children's future could not be made secure. There is, though, one item the education of the two professions has in common: each takes place within a narrow national framework. Both, however, could be enriched by a more resolute insistence on acquiring world horizons. Concentration on national framework may be bread and butter; concentration on international insights only a frosting on the educational cake. Such argument is spurious. An opulent, advanced nation must pay attention to the quality of its luxuries. The purpose of this article is to argue for an early inclusion of comparative dimensions into the training of lawyers.

Should there be comparative study at all in the law school curriculum? Should there be a separate course offering or offerings and, if so, should such programs be compulsory? Or, should comparative perspectives inform and invest all courses taught instead of being separated into distinctive groupings? Finally, should such exposure begin right at the outset of training? These questions define the subject matter of the discussion that follows.

The Merits of Comparative Law

At issue are the constraints of the law curriculum and, in particular, the fierce pressures upon the student in its first year; but, as a preface, a word must be given to point out the general value of comparative analysis. Comparative methods in law, as in education and other social sciences, have a twofold purpose: 1) to enlarge knowledge, increase insights, and sharpen the general perceptions of students, and 2) to encourage or deter reform by facilitating the borrowing of desirable features from foreign systems and rendering such borrowing less likely by predicting unfavorable outcomes if unsuitable features are transplanted.

In the Service of Knowledge

Men gain knowledge by introspection and that knowledge virtually explodes if derived from what Alfred Whitehead once called the virtues of trained intelligence. From a distance, a point on a blackboard and a diamond held close to it look deceptively similar. Closer examination reveals that one is round, the other octagonal; one is flat, and the other spherical. Comparative approach brings this burgeoning shape into relief. As in all social sciences it transforms a national problem viewed as undimensional into a multidimensional concept. It brings the rationale of one's own law into sharper focus. It provides assurance that our institutions are not only well-suited to our needs but that they possess a lofty abstract dimension of excellence. Or, alternatively, it makes us vividly aware of our shortcomings. It suggests precedents by the use of which such deficiencies could be corrected.

An example from the law of public morality may illustrate. Of all crimes, the legal treatment of prostitution is the most perplexing. Aside from the

fascination this crime holds for the prurient, to law teachers (the second oldest profession?) it provides an occasion to teach about victimless crime. The accessory, the "non-victim" client, must testify against the prostitute in order to establish the evidence of solicitation beyond reasonable doubt. But in order to testify for the state the "John" must be given immunity; otherwise he would have to invoke the Fifth Amendment since many states specifically make patronizing a prostitute a crime and several also retain on their books the ancient laws forbidding adultery and fornication. Since the law is thus tougher on the seller than on the buyer, one may infer that what is sought to be eradicated is not the erotic act but the offering of such services for sale. Even at this point, a cynic might claim that marriage itself—which is not valid until consummated—is also an offer of sexual services in exchange for financial support. What seems to be at issue, then, in proscribing prostitution is that payment is demanded *first*—in anticipation of erotic services. Only societies demanding bride-purchase money would have to cope with the distinction between their customs and that definition of prostitution.

To drive this point home for students we might offer the example of Japan. The Japanese banished the centuries-old institution under the influence of American occupation. Since prostitution in Japan traditionally has not been and is not now a "moral" offense, the Japanese missed the "morality play" attendant upon it in America. But they seized the legal point well. In 1954, when prostitution was outlawed, the Japanese thought they were enacting an American-type law. Accordingly, the statute declares a prostitute to be one who asks for money *first*; if she loves first and then asks for money, under that law she is a girlfriend. Thus, in transplanting the form of American law, the Japanese identified the central legal point with much perspicuity.

Examples such as these can be multiplied *ad infinitum*. Comparative law, like all other comparative disciplines, informs the student, broadens his horizons, and makes him better able to understand himself and his own institutions. No one seriously doubts the need for a historical perspective; why should there be doubt about an equal value of the geographical one? To compare in time (historically) is to add vertical dimension, to compare in geographical space is to add a horizontal one. If levity be forgiven, we may paraphrase Sakini's lines in *Teahouse of the August Moon*, when he concludes that the reverse inhibitions that Americans and Japanese display against naked bodies in mixed public baths, and naked statues in public parks, suggest that what is considered to be pornography is a matter of geography.

To translate these general propositions into detailed justifications for comparative law, reference may now be made to Rudolf Schlesinger's classic. *Comparative Law* was published in 1950, and became the ranking textbook on the subject. In it, the venerable doyen of the field, then at Cornell, now at Hastings, supplies extensive documentary materials to prove item by item the relevance of comparative method to the study of law. His stated aim is "to acquaint his students with the *technique* of using foreign materials (for whatever ultimate purpose), and to de-provincialize their minds by increasing their *knowledge* of legal institutions outside their own habitat" (p. xi).

In classifications, the tricks comparative materials play are revealing. A notary public in Europe is an imposing official legal title, little related to the American notary who charges 50 cents for verifying signatures. Is western marriage the same as polygamous marriage, and, if not, is it the same as the *first* marriage in the Moslem family? Was the Cuban *hypoteca* a mortgage or real property since it required no bond, carried no personal obligation and was described by Cuban law as "immovables"? Is the Colombian patrimony tax an income tax or not, since it is levied on income, patrimony (taxpayer's net worth), and excess profits, as a single tax? These comparative confrontations generate interest and excitement. Their teaching effect is both ways, outward and inward. As a wise mother used to say while pushing her son out to school, "For the shirt come to mother, for the brains go to strangers." There can be no dispute about the value of reaching out to learn how others practice law. But comparative confrontation sheds light on all parties to comparison. As Torquato Tasso was made to say, "to know thyself, compare thyself to others."

In the Service of Reform

To facilitate intelligent reform is to advance knowledge. This function of comparative law, however, may be singled out for special treatment—which will allow us to focus on its dynamic purposes. Facilitation of reform may or may not mean transplantation of foreign law. Not the borrowing but the prediction of outcomes based on comparative knowledge of the analogous outcomes abroad is at issue. Comparative law affords an opportunity to marshal materials with

which to buttress the demands for change at home. The shift is from descriptive to normative, although hopefully normative while remaining analytical.

At the level of detailed justifications, the reformative and predictive purposes of comparative law are described in some detail in George Winterton's recent article (23 *American Journal of Comparative Law*, 69, 1975). Under the heading of expanded knowledge, Winterton writes about the merits of comparative law in improving the student's understanding of his own national law, and the acquisition of practical equipment to deal with cases involving foreign law. These are the points already elaborated by Schlesinger and others. Winterton's novel contribution is to point out policy potentials of comparative law. He sees its uses as a validating tool against which to measure the planning of reforms of national laws (or for that matter, of legal education). He also sees its more ambitious role as a driving force towards the unification or harmonization of legal systems, so that a legal world order may be helped to emerge (p. 76). Winterton's example of the failure to predict the outcomes of transplantation include the unsuccessful European-derived efforts in India to divide inheritance equally among sons and daughters, and prohibiting child marriage, and equally unsuitable efforts by Pakistani laws to prohibit polygamy and unilateral divorce (p. 84). Winterton's paper contains further sections on the value of comparative law for developing internal policies, for fostering international understanding, and even for propaganda purposes. He deplored the last-mentioned, though he recognizes that most systems are tempted to increase an ideological commitment to their own system by comparison to the ill effects of others.

Historically, the reformative use of comparative method precedes the analytical use. Thomas More, for example, considered it to be the basic tool for constructing Utopia and had some sharp words for those who refused to comply. The eighth-century itinerant Arab merchant, Ibn Khaldoun, reported upon his return from his voyages abroad about education in order to exhort his fellow citizens to improve their schools. De Tocqueville's *Democracy in America*, though it comes closest to an analytical work is also pragmatic in character. So is the first Japanese classic about the west—Yukichi Fukuzawa's *Seijo Jijo*—which contributed much to Japan's westernization. The greatest record of spiritual and moral regeneration comes from the influence of "foreign" books: the sacred books of the Manu, the Bible and the Koran. Not only books but gunpowder, paper and spices traveled west, as industrial machinery now travels east, changing the quality of life wherever they arrive.

As to the United States, one need only to go through the writings of Professors Goerbel and Smith at Columbia University to confront a story of the reception of English laws in the colonies, which, in itself, is an essay in comparative jurisprudence. What catches the eye are the distinctions between the reception of presettlement and postsettlement statutes, the role of the courts in refining the notions of common law, and the nonenforcement of harsh medieval criminal punishments in defiance of the letter of the transplanted statutes. We may say that comparative law *began* as a tool of reform and *progressed* to a purer analytical tool for a dispassionate academic enquiry. It is submitted that only the latter is appropriate as subject matter of comparative law for law students.

The Merits of Early Exposure

"The university," Nathan Pusey of Harvard once quipped, "is a system of independent professorial chairs loosely united by plumbing." The professor-princes, each paramount in his own fiefdom, are staunchly united (and divided) by the belief that their own subject should be obligatory for all students. One may thus be pardoned for believing that comparative confrontation is the single most valuable thing a law student can do to keep his mind sharply honed for use. There have been, on record, student opinions to confirm this belief.

> Personal experience shows that they (the students) feel that study of law bearing upon foreign and international questions helps to provide in a mosaic form a better framework for the understanding of the elements and forces which shape the international scene. (J. Mayde, "The Value of Studying Foreign Law," 1953 *Wisconsin Law Review* 652)

Roscoe Pound once defined comparative law as assuring "faith in the analytical jurisprudence." For him, as for all students, the study of comparative law is the beginning of a journey towards "a law above laws to be found by comparative analysis of a developed body of law." ("The Place of Comparative Law in the American Law School Curriculum," 8 *Tulane Law. Rev.* 161, 1931)

Comparative Law as a Basis of Study

But, must the student do this valuable task in the early years when buried under the avalanche of pressures? Furthermore, if he must, can he do it

well, and if not, should he do it at all?

For a negative answer we may take notice of an analogy in the field of comparative education. In a paper read in 1975 in San Francisco to the convention of the Comparative and International Society, Dr. Merle L. Borrowman, then Dean of the School of Education at the University of California at Berkeley, denied the validity of comparative education in the training of teachers (19 *Comparative Education Review*, 354, 1975). Concerning himself with the place of comparative studies "within something like one academic year devoted to pedagogical instruction and apprenticeship," Borrowman shocked the comparative students by asserting that a "half loaf may well be worse than none." He did not deny the patent merits of comparative studies, but he felt they were out of place in the first year of professional preparation.

These views are not dissimilar to some held by those in the legal profession. For example, Arthur Sutherland, then a respected professor of law at Harvard, once wrote thus:

> A colleague once asked me when I was urging this scheme (a new law curriculum) what I would do with a man who had given special attention to Soviet law. I said that he ought to know enough American law after two years of study, to make passable responses to questions touching preannounced areas; moreover, relevant comparative law references could be striking and effective touches. I would expect a lot of such unusual matters to be covered in seminars. ("Lessons from Oxford: A Model Proposal," 19 *Buffalo Law Rev.* 51, 1969-70)

The "early exposure" arguments of pedagogues are colored by the fact that for the majority of their students, one year of M.A.-level training is all there is. The "first year" comparative law may be argued on similar grounds. The "Why first year?" questioners cannot be permitted to add "Why not second year instead?" to their arguments. Comparative law *is* being offered and should be offered in subsequent years, either to catch the "late starters" or to permit the early starters to deepen their expertise. The "Why first year?" question can thus be more comfortably narrowed to the claim that comparative knowledge is a "basic course." Like torts or contracts, comparative law must be viewed as being at the root of law, indispensable to the basic understanding, a condition precedent to subsequent legal training. For those who claim that comparative law is not a subject, but a method, the answer should be that it must then be likened to legal method, or to the art of briefing cases. In short, it is an important instrument in the store of lawyerly thinking.

Comparative law "pushes the walls outward" and permits more than Orwellian "double-think." It permits "multi-think"—anticipated and hoped for by the encephalizing brain of Chardin's *Phenomenon of Man*. Comparative law is a vehicle of additional intellectual vision. Professor Robert Ulich of Harvard thought that comparative method brings powers of self-transcendence (*The Human Career: The Philosophy of Self-Transcendence*, New York, Harper, 1955 [1st. ed.]). It permits the mind to leave the body and look at its doings from a distance; soon, one sees one's self in perspective. The basic value of immersion in comparative law as a first year exercise is not so much that it teaches foreign law, but that in so doing, it sets confines of one's own law. It defines the "space" allotted to oneself by showing the expanse of the space surrounding it.

Even in the happy event that the argument advanced so far proves irresistible, it stumbles at the next step of actual implementation. When an argument regarding what to do is settled, the question of how it should be done remains. The very force of the plea that comparative law is indispensable suggests, logically, that the content should inform all subjects. In other words, there should be no comparative law as a subject. There should be a comparative component, or further still, a "world" rather than "national" frame-of-reference in each subject offered by the law school.

One Basic Course

Whatever the merits of the total global approach, the alternative of offering one first-year course in Comparative Law is more compact and less confusing. But if comparative law is both indispensable and desirable, then the argument for its representation in the first-year curriculum by one course has to be made in terms of a required offering. An elective course merely provides an option for some students to study what, by definition, might be worthwhile but is not a matter requiring compulsion. An argument for an elective course is also harder to rationalize in the first year as contrasted with upper-class offerings. It becomes a minor matter whether to offer the volunteers an opportunity to study Comparative Law early or late in their law school careers.

The decision to establish one compulsory course,

also, does not solve the issue. Should such a course cover the waterfront, include international law, *be* international law instead of comparative? Should it treat one area, two areas or whole regions? Should common and civil law only be compared and contrasted, or should Roman and Muslim, or Chinese and Soviet law be included? Should offerings be buttressed by secondary sources so that the students may benefit from digested opinions of scholars? Or should it be from primary sources—in the hallowed law school tradition?

Some answers to questions such as these are forthcoming from the Columbia symposium on the subject. (19 *American Journal of Comparative Law*, 615, 1971) The two techniques offered as resolution lead from specific to general, and from general to specific. Professors Hazard, Cohen and Stevens represent the area approach. They would teach Soviet or Chinese or Japanese law as an initiation to comparative studies. Professors Schlesinger, von Mehren and Gray prefer a general multicountry approach. Theirs would be a basic course treating materials comparatively.

The area specialists see their approach as ensuring the same benefits as a more compendious treatment and adding to it greater depth of specialization. To Professor Hazard, comparisons with Eastern Europe have all the strengths of a conventional comparison with Western Europe, and in addition offer dimensions of Marxism and peasant culture as a field of study. Professor Cohen thinks Chinese law conveys equipment for dealing with national elites abroad. He sees this "political function of comparative legal education" as applicable to the United States and a means to exorcise "the spectre of parochialism (that) has long hung over American legal education." Professor Stevens sees parallels between Japanese and American law because both are mixtures of other systems, and have built-in capacities for dynamic change. All the area proponents are bent on a comparison of the country under study with the host country, and thus in a sense advocate a two-way comparison.

The generalists differ only in that their comparisons are "multiway." Professor Schlesinger favors the course along the outlines of his case book, supported by irrefutable argument "that thousands of students and dozens of instructors in the past have survived" it. "Nobody has ever questioned the potential usefulness of a general introductory course in geology or astronomy, even though in both fields the territory to be covered is at least as vast, *mutatis mutandis*, as in Comparative Law." (p. 621)

Professor von Mehren sees the basic course as "simply shorthand for the comparative study of two or more legal systems." No subject can *a priori* be excluded; the condition of inclusion being, simply, that it should be compared. The basic course would supply comparative law with a "core tradition." Its major purpose would be to reveal the interactions between the law and society, to stress the importance of legal order as an institution and to trace the consequences of its operation.

Professor Gray would endow the basic course with a fresh focus, concentrating on the fact that it is the first such course for the students. He urges teachers "not to stray too far either from familiar substantive areas or from foreign comparison in systems with which (they have) some first-hand contact." (p. 638) His course would be closest in the type of immersion and coverage to the area proposals.

The specific issues of how best to organize the comparative content of law are as yet undecided. But enough has been said to point out the residual force of law faculty support and the incipient benefits of including comparative components prominently and early in the education of law students. Devotees of comparative method, the exhilarating, and yet little understood device to wrest greater insights from available evidence should not lament the recalcitrance with which vast number of their colleagues meet their well-directed efforts.

Men who spend their lives in moving the minds of other men from visions of one country to two, to many, to the entire globe need make no apologies nor fear oblivion. They simply need to watch with patient understanding the widening of the experiences they fostered at any available level of the curriculum. They must delight at the recognition of the intellectual discovery which they were instrumental in kindling.

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