

**The University of Florida Fredric G. Levin College of Law
LL.M. in Comparative Law Program
Fall 2019
Professor Pedro A. Malavet**

Introduction to the Comparative Method

**(Comparative History and Philosophy
of the Common and
Civil Law Traditions)**

Edited Reading Materials for the Course

**(This handout includes the supplementary text that I will use this
fall; our other materials will come from the Burnham text).**

Handout No. 1

Editorial Note

This set of materials is a collection of texts that I have put together for the first time during the Spring of 2006 as experimental teaching materials for my Comparative Law course at the University of Florida Levin College of Law.

The texts are other peoples' work —except for some of my own essays and articles and a few questions and explanatory notes that I have inserted into some of the chosen materials. I have identified the original source at the start of each section. I have strived to keep the materials as close to their original form as possible, and have expressly indicated any major changes that I have made in the introductory note. The most common edition is the elimination of footnotes, those that remain are usually renumbered.

—Pedro A. Malavet
Professor of Law
July 2018

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Chapter 1

COMPARATIVE LAW AS LOOKING GLASS: WHAT FOREIGN LEGAL SYSTEMS CAN TEACH US ABOUT OURS

By Pedro A. Malavet*

A. INTRODUCTION

This essay was my contribution to the panel titled *Comparative Legal Systems in the Americas: What We Can teach each other* in the University of Florida's *Legal and Policy Issues in the Americas Conference* to be held in Montevideo, Uruguay, in May of 2010.¹ My participation in these international exchanges has always been strongest when I am a facilitator of legal communication and understanding between my students and colleagues and our international counterparts. I am effective in this regard because I have a reasonable command of comparative methodology and knowledge of the language and institutions of both the common law and the civil law traditions. I have honed these skills mostly by teaching a comparative law course that I design to be as effective as possible in transmitting some basic aspects of this cross-cultural knowledge to the broadest possible audience of United States law students and, occasionally, international law students and practitioners. My experience has taught me to maintain a general focus that can be translated, usually on the basis of historical experience, to the broadest number of situations and international exchanges. As an academic, I can best accomplish these goals through my general comparative law course. Accordingly, this essay will explore my pedagogical approach to comparative law.

I have taught comparative law at the University of Florida College of Law for fourteen years. For the past five, I have used my own selected and edited texts to teach the course because the text that I had been using —John Henry Merryman's *"The Civil Law Tradition"*— which was new when I started my full-

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¹ See generally <http://www.law.ufl.edu/cgr/conference/> (last visited April 14, 2010).

time teaching career, had not been updated since 1994.² The readings that I chose reflect my appreciation for the old Merryman text, and my years of experience as a comparative law teacher, especially my interest in an historical, jurisprudential and ultimately cultural approach to the subject.³ I am currently dedicating part of a sabbatical to writing a proposal to turn these readings into a comparative law textbook and as part of that process I have been asking: what is the pedagogical utility of comparative law in a United States classroom?

I start answering that question by defining the field, which I prefer to do along the lines of Professor Rudolph B. Schlesinger's excellent description of Comparative Law:

Comparative Law is not a body of rules and principles. Primarily, it is a method, a way of looking at legal problems, legal institutions, and entire legal systems. By the use of that method it becomes possible to make observations, and to gain insights, which would be denied to one who limits his study to the law of a single country.

Neither the comparative method, nor the insights gained through its use, can be said to constitute a body of binding norms, i.e. of "law" in the sense in which we speak of "the law" of Torts or "the law" of Decedents' Estates. Strictly speaking, therefore, the term Comparative Law is a misnomer. It would be more appropriate to speak of Comparison of Laws and Legal Systems. . . .⁴

While I emphasize to the students that my course is not "trade law,"⁵ I point out that doctrinal comparative legal analysis is essential in today's growing international market, particularly when society considers the globalization of legal practice.⁶ This occurs, for example, in the context of many U.S. law firms

² See John Henry Merryman, David S. Clark, John O. Haley, *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICAN AND EAST ASIA* (1994) (hereinafter "Merryman, Clark & Haley"). The casebook is often confused with the compact introductory overview originally published by Professor Merryman in 1969 and referenced in note **Error! Bookmark not defined.** *infra*. However, in the Summer of 2010 a new edition of this classic textbook was produced. John Henry Merryman, David S. Clark, John O. Haley, *COMPARATIVE LAW: HISTORICAL DEVELOPMENT OF THE CIVIL LAW TRADITION IN EUROPE, LATIN AMERICA, AND EAST ASIA* (Lexis-Nexis 2010).

³ You may review my Syllabus, reading assignments and detailed class notes at <http://nersp.osg.ufl.edu/~malavet>, follow the "comparative law" link on the top left.

⁴ Rudolph B Schlesinger, et al., *COMPARATIVE LAW 1* (5th ed. 1988) (footnotes and italics omitted). An updated definition appears in the newest edition of this textbook. See Ugo A. Mattei, Teemu Ruskola and Antonio Gidi, *SCHLESINGER'S COMPARATIVE LAW 7* (7th ed. 2009).

⁵ By "trade law" I mean two general areas. First, the public international law regime governing trade, such as the World Trade Organization or the North American Free Trade Agreement. Second, the private transactions that are often covered in International Business Transactions courses. I explore this further in section II-A below.

⁶ See Hans W. Baade, *Comparative Law and the Practitioner*, 31 *AM. J. COMP. L.* 499 (1983) (providing a general discussion of the practical importance of Comparative Law).

representing clients with offices abroad. “The increasing rate of interaction across national borders is one trend that is clearly correlated with certain aspects of growth in law.”⁷ Indeed, at least before our recent financial meltdown, transnational law practice has been an increasing source of revenue for American lawyers. According to the U.S. International Trade Commission: “Worldwide legal services revenue increased from \$363.6 billion in 2003 to \$458.2 billion in 2007. U.S. legal service firms are very competitive in the global market, accounting for 54 percent of global revenue in 2007 and 75 of the top 100 global firms ranked by revenue.”⁸ In 2007, the U.S. enjoyed a trade surplus in legal services of \$4.9 Billion.⁹

A lawyer in international or transnational practice ought to provide her client with a full understanding of the law in its proper context using comparative methodology.¹⁰ “Law, taken alone and considered only in its strict theory, would give a false view of the way in which social relations, and the place therein of law, really operate.”¹¹ Understanding the “cultural, social, political and economic systems” in which the law must be applied is essential when instructing a client on the “relevant considerations” of international legal transactions.¹²

Thus, my first forays into comparative law writing had produced a fundamentally practical and practice-oriented answer to the question of the utility of comparative law: comparative law study bridges the cultural gap between our legal system and those that are foreign to us in order to complete certain legal transactions. Accordingly, my first law review publications addressed how the

⁷ Robert C. Clark, *Why so many lawyers? Are they good or bad?*, 61 *FORDHAM L. REV.* 275, 288-90 (1992). “A survey appearing in the *International Financial Law Review* in October 1985 listed eight law firms with more than four offices in foreign countries, and listed over forty additional law firms with offices in at least three different countries.” Roger J. Goebel, *Professional Qualifications and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 *TUL. L. J.* 443, 508 (1989).

⁸ U.S. Int’l. Trade Comm’n, *RECENT TRENDS IN U.S. SERVICES TRADE—2009 ANNUAL REPORT* at 6-1 (2009) (footnotes omitted) (found at <http://www.usitc.gov/publications/332/pub4084.pdf>) (last visited April 6, 2010).

⁹ *Id.* at 6-8. See also Euromoney Publications PLC, 3 *INT’L FIN. L. REV.* vii (1993). This represents a very substantial increase since I first studied the subject in the 1990s, when the value of legal services exported by U.S. firms jumped from \$ 147 million in 1987 to nearly \$1.2 billion in 1991, while during this same period purchases of foreign legal services by US citizens increased from 55 million in 1987 to \$ 222 million in 1991. Int’l Trade Comm’n, *INDUSTRY AND TRADE SUMMARY: LEGAL SERVICES* 2, 3 (Feb. 1993).

¹⁰ Goebel, *supra* note 7, at 447. Professor Goebel notes that this is not a universally accepted tenet. *Id.* at 454. Goebel correctly concludes that this is an important, even essential requirement for properly carrying out the attorney’s professional responsibility to their clients. *Id.* See generally Schlesinger et al., *supra* note 122 for a general discussion of the importance of understanding a legal system in its proper context.

¹¹ See Rene David & John E.C. Brierley, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* (3d ed. 1985).

¹² Goebel, *supra* note 7, at 444-54.

notarial monopoly sometimes presents an insurmountable obstacle to foreign-country practice by American lawyers, in certain crucially important areas of the law.¹³ However, with a proper understanding of this legal profession, American lawyers could turn this exclusivity to their benefit. By working with foreign notaries, American lawyers, and my future-lawyer students, could expand client-counseling and representation abroad, while ensuring that transactions are legally proper and more easily enforceable. In transnational practice, the Latin Notary should be seen as an ally to an American legal professional, not as a competitor. I was thus using my scholarship and classroom to give the U.S. a view of legal systems that are foreign to it, with my students' future law practice in mind.

My years of teaching and writing experience, however, have also led me to emphasize to my students that at this early stage in their careers in law comparative methodology is most useful because it gives us a lens through which to look at our own legal system and study it in a level of detail that we would not otherwise consider. While this pedagogical approach teaches the methodology that will allow practitioners to effectively bridge the gap across legal professions, systems and cultures,¹⁴ it also fits within the broader goals of educating United States lawyers to understand their own legal system. Additionally, it contributes to expanding the theoretical foundations of American legal scholarship.

The comparison of laws and legal systems is an essential part of the proper development of legal theory. To the French, for example, comparative law (*droit compare*) "is not a branch of the law, but very specifically a part of the science of law (*science du droit*)."¹⁵ This is not to suggest that doctrinal uses of comparative methodology are unimportant; there is a strong need for both theoretical and doctrinal comparative analysis. Indeed, there will often be a great deal of overlap between the doctrinal and the theoretical. The distinction between doctrinal comparative methodology and comparative legal science will depend on the purpose of the comparative study. One example that is especially pertinent to this conference is that the comparative method will give a national scholar "a better understanding of his own law, assist in its improvement, and ... open[] the door to working with those in other countries in establishing uniform conflict or

¹³ See Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, a Historical and Comparative Model*, 19 HASTINGS INT'L & COMP L. REV. 389 (1996) [hereinafter *Counsel*]; Pedro A. Malavet, *The Non-Adversarial, Extra-Judicial Search for Legality and Truth: Foreign Notarial Transactions as an Inexpensive and Reliable Model for a Market-Driven System of Informed Contracting and Fact-Determination*, 16 WIS. INT'L L. J. 1 (1998) [hereinafter *Non-Adversarial*]; and Pedro A. Malavet, *The Foreign Notarial Legal Services Monopoly: Why Should We Care?*, 31 J. MARSHALL L. REV. 945 (1998). PDF versions of all these articles are available at: http://works.bepress.com/pedro_malavet/ and <http://ssrn.com/author=624526>.

¹⁴ See generally Goebel, *supra* note 7 at 508.

¹⁵ Jean-Luc Aubert, INTRODUCTION AU DROIT 55 (Pedro A. Malavet trans., 5th ed. 1992). See also David & Brierley, *supra* note 11 at 2-3, 11-13.

substantive rules or at least their harmonization.”¹⁶ International legal reform efforts require particular emphasis on comparative methodology, and a general acceptance that it should be a *multilateral* process.

I will use the remainder of this essay to describe what I believe to be the pedagogical utility of comparative law in a United States law school as a lens through which to re-view our own legal system. I will first provide a general overview of a comparative law course, with a narrative of my pedagogical approach to and objectives for each subject. I will then use a typical exam question about comparative constitutionalism to illustrate how I ask students to consider fundamental differences between the western European approach to the public order and ours, and to show how our system reflects very specific choices regarding constitutional ordering that are not often considered in American legal studies. Having a better understanding our legal system by looking at it through our knowledge of systems foreign to us will produce better legal professionals, and this experience will make us better international legal practitioners and ambassadors.

B.COMPARATIVE LAW COVERAGE AND PEDAGOGY

I teach comparative law as a two- or three-credit course, which naturally affects the depth of coverage, because this flexibility allows me to better fit within my school’s curricular needs. The reading materials that I currently use and the book that I hope to write, cover subjects designed to allow my students to develop the methodology of comparative law to understand some comparative case studies of foreign legal systems, and then to use that knowledge better to understand the legal system of the United States. I will illustrate my approach by providing a narrative description of each subject covered in my course. I will do so by describing the chapters of a comparative law textbook as I would write it. Unless otherwise indicated, in this section I will generally use chapter titles as the subheadings.

1.COMPARATIVE LAW: OBJECTIVES, DEFINITIONS AND METHODS

As I have already stated, I emphasize to my students that I will not cover “trade law.” By this I mean that I do not cover public international law generally, nor the treaty regimes that govern trade among nation states. I also do not cover the field that is generally labeled “international business transactions” in many law school curricula. Those are subject matters of separate courses at my school. I have learned that I need to explain this to my students in order to avoid the

¹⁶ David & Brierley, *supra* note 11, at 11-12.

disappointment that may result from enrolling in a course that is not quite what the student expected. Comparative law is an elective course, and the classroom dynamics and pedagogical experience are greatly improved by having students who self-select to be in the course. This should be incorporated into the book's introduction and should be emphasized in the course description at schools with substantial Public International Law and IBT curricular offerings.

As noted in the introduction to this essay, I have always approached comparative law as Schlesinger defined it in his textbook: as method for comparison. In my first chapter, I explain my method approach to the students in order to bring their attention to what the course is all about. I then provide them with some historical background on the origins of comparative law and its objectives. The objective of any law study is of course dependent on its purpose and desired results, but the comparative method is dynamic enough to be adapted to many purposes by a thoughtful law student or practitioner. I emphasize to the students that for a law geek like myself, there is always the simple enjoyment of studying law because I find it endlessly amusing and entertaining (students generally do not seem as giddy as I was when I was a law student, so I often tell them that for me this whole exercise is fun; otherwise, they find that my light-hearted attitude is not directed to the subject-matter of the course, but at them). This is followed by an overview of multiple comparative law methodologies. This gives the students a way to structure their study of the assigned readings that we will cover, and their own research, in the manner that is best adapted to their learning style and objectives.

I finish this chapter by pointing out that my typical students spend three years studying the law of the United States and I will have two to three hours per week in a one-semester course to teach them about the rest of the world. Something has to give, so I choose to focus on what Professor Merryman eloquently described as the Civil Law Tradition rather than the Civil Law system:

The reader will observe that the term used is "legal tradition," not "legal system." The purpose is to distinguish between two quite different ideas. A legal system, as that term is here used, is an operating set of legal institutions, procedures, and rules. In this sense there are one federal and fifty state legal systems in the United States¹⁷⁾ separate legal systems in each of the other nations, and still other distinct legal systems in such organizations as the European [Union] and the United Nations. In a world organized into sovereign states and organizations of states, there are as many legal systems as there are such states and organizations.

A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost

¹⁷ And several territorial legal systems in the United States Territorial Possessions. See generally, Pedro A. Malavet, *AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO* (2007).

always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.¹⁸

I try to incorporate as many examples of particular legal phenomena as possible into my lectures, but there must be a fundamental focus for the course that the students—and I—can use to gauge their progress. For my basic comparative law course, that is the western European legal tradition, its historical evolution, current form, and modern development, most especially as seen in France, Germany and, to a lesser extent Spain.

With the methodology and course parameters thus defined, I move on to some specific methodological case studies.

2. THE SPECIAL HAZARDS OF COMPARATIVE LAW

This chapter is a warning for the students not to overreach with the methodology discussed in the first chapter and with comparative law in general. It is in an important way a specific refinement of comparative methodology: whereas chapter one covers what to do, chapter two warns about what not to do. I emphasize the distinction between law and legal systems, and between official legal systems and actual practices within the official legal system and the possible existence of informal legal systems.¹⁹ I then move on to more specific challenges, such as language. I point out to my students that they will spend three years in an American law school learning American Legal English, and they immediately understand that simple fluency in another language is not enough for legal work.

This chapter would include several specific examples of language challenges. For example, as discussed later in this essay, I point out that they will recognize the word “notary” easily, but that if they understand it to mean a person who certifies documents, such as the secretaries in the Office of Student Affairs at our law school, they will fail to understand that for the rest of the planet “notary” means a specialized legal professional. Consistent with my practice of providing examples relevant to purely domestic law practice, I also point out that they may well run into the need for legal translation here in the United States, when representing clients who speak languages other than English. It is especially important when litigating with the use of simultaneous translation, where errors in

¹⁸ Merryman, Clark & Haley, *supra* note 2 at 3-4.

¹⁹ For one of the most influential case studies on informal legal systems, see generally Hernando de Soto, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (1989).

translation that are allowed to make it into the transcript may create a misleading record of the proceedings.²⁰

Language poses a major pedagogical challenge for the course. My students have repeatedly reported that they found the readings difficult to understand because they were written in “awkward” language. This seems to be most directly related to a general lack of skill in languages other than English on the part of the students. By contrast, the readings are often translations from languages other than English, or the works of persons familiar with multiple legal languages who purposely choose words that may appear awkward to a monolingual English speaker, but that are common in the international language of law, especially because of the legal institutions and concepts that are common to the civil law tradition. This is the cultural gap that is most pertinent to a college or law school classroom in the United States, and one that I will strongly strive to bridge in my book. On the other hand, becoming even rudimentarily familiar with the common institutions and concepts can improve transnational legal communication immensely, even when the parties speak multiple languages.

3. THE COMPARATIVE METHOD IN UNITED STATES CASES

In this chapter I currently use two cases to illustrate how the comparative method might be needed in U.S. courts. One illustrates our treaty obligation to apply law or legal terms in the manner that they would be defined in a system foreign to us. Consistent with the Merryman cabook, I use *Eastern Airlines v. Floyd*,²¹ a U.S. Supreme Court case to illustrate how the United States has obligated itself to apply certain legal terms as they were defined by the French legal system, and illustrate how a merely literal approach is simply not possible. I point out to the students that a good advocate could have used comparative methodology, particularly explanations about the hierarchy and strength of legal sources in the French legal system, to construct a more effective argument for the Supreme Court. I then use a case from the U.S. District Court in Puerto Rico to illustrate how a civil code provision must be applied,²² and point out that in Florida, Louisiana and many parts of the U.S. Southwest, there are old Spanish and French legal rules that are still in effect, and that require comparative methodology, as

²⁰ While clerking in the United State District Court for the District of Puerto Rico, I observed many trials in which simultaneous translation was required, and heard many “objections to the translation” made by multi-lingual counsel, and even corrections that had to be made by the presiding judges.

²¹ 499 U.S. 530 (1991). This is one of the cases Professor Merryman included in his casebook. Merryman, Clark & Haley, *supra* note 2 at 171.

²² In *Re San Juan DuPont Plaza Hotel Fire Litigation*, 687 F. Supp. 716; 1988 U.S. Dist. LEXIS 4603 (U.S. Dist. Ct. P.R., Acosta J. 1988) (granting summary judgment in favor of architects who designed the hotel on the basis of Puerto Rico Civil Code article of repose, Article 1483, 31 L.P.R.A. sec. 4124 (1930)).

opposed to the normative U.S. approach, to understand and litigate them properly. In Florida for example, some old land grants still take us back to the *Leyes de los Reynos de las Indias*,²³ the old Spanish laws for their colonies in the Americas, and may well take them back to the *Partidas*, the legal code produced in Spain circa 1265 (which I will then use in the historical part of the course to illustrate the legal evolution of the western European tradition).²⁴

4.LEGAL EDUCATION IN THE CIVIL LAW WORLD

This is the first of two chapters designed to use the students' experience in a detailed comparative legal exercise. In reviewing this material, I tell the students that I choose legal education for an initial extended comparison because they are all very familiar with their own legal education. Therefore, they can identify the strengths and limitations of the general statements made in the readings about our own system. This will help them to understand that legal generalizations are often difficult and wrong, but they can also be largely accurate and helpful to the comparativist, provided we are aware of their limitations.

I especially emphasize that legal education outside of the United States is fundamentally an undergraduate degree. Indeed, in Spain and in most of the Americas, a basic law degree and membership in the local *Colegio de Abogados* (the unified bar association)²⁵ are the usual path to private law practice. However, there are many specialized professions in the Civil Law Tradition —notaries, prosecutors and administrative officials and judges, for example— that require specialized education and have specific requirements for admission. Additionally, in countries like France and Germany, there are specialized graduate schools or curricula for these professions, and this has an important effect on legal culture and performance. For example, historically, most of the members of the Constitutional Council of France are former students or graduates of the *Ecole*

²³ See RECOPIACIÓN DE LAS LEYES DE LOS REYNOS DE LAS INDIAS (Francisco de Icaza Dufour, ed. 1987) (a five volume reprinting of the laws sponsored by the Escuela Libre de Derecho in Mexico) and DE LAS LEYES DE INDIAS (ANTOLOGÍA DE LA RECOPIACIÓN DE 1681) (Alberto Sarmiento Donate, ed. 1988) (a succinct, annotated selection of the laws). Both generally and in law, Spanish *conquistadores* referred to the new colonies of the Americas as the “*Indias*” (Indies) and to the indigenous inhabitants thereof as *Indios* (Indians). See IV DICCIONARIO ENCICLOPÉDICO DE DERECHO USUAL 389 (explaining that use of *Indias* was due to Columbus' error in mistaking the islands of the Caribbean and the Eastern coast of the Americas with the Eastern coast of the Indian subcontinent); see also *id.* at 392 (“*Indio*” refers to indigenous peoples of what the Spanish called the Indies).

²⁴ See generally Robert I. Burns, S.J., *The Partidas: Introduction*, in 1 LAS SIETE PARTIDAS xi (Samuel Parsons Scott, trans., Robert I. Burns, ed. 2001) (providing a description of the making and influence of this legal code in the introduction to a five volume English translation of the laws).

²⁵ Spain, for example, has multiple local and regional *Colegios*, organized under the umbrella of the national *Consejo General de la Abogacía Española* (National Council of the Spanish Bar). See <http://www.cgae.es/> (last visited April 13, 2010).

Nationale D'Administration (known by its initials as the ENA)²⁶ or one of the *Instituts D'Etudes Politiques* (the Institutes for Political Studies),²⁷ which train members of the high bureaucracy and government officials, and relatively few have experience as ordinary judges or magistrates. This in turn affects the culture of the Council and its operations.²⁸

I contrast the long and specialized nature of European law study, with the professional and liberal tradition of law studies in the United States. A U.S. law graduate is able, and even expected to work in different legal disciplines throughout her career. The typical European student will have to make a more specific commitment to a particular professional specialty earlier, and will be required to study and work according to this choice. Over the past few years, I have been lucky to have a number of foreign students in my classroom, and this has allowed me to engage the students in a dialog about the very different expectations of legal education that predominate on either side of the Atlantic or Pacific, and from North to South in the Americas.

This chapter always generates very lively discussion about legal education that I then turn into an in-depth case-study on comparative methodology. I spend most of the time purposely trying to get students to think about the disagreements that they might have with some general statements used in describing the U.S. system such as “meritocratic” admissions, “small” class size, “high-expectations” of students, “interactive” classroom teaching. In addition to finding it unbearably amusing, I have a pedagogical purpose for this discussion: it really teaches them to understand the strengths and limitations of general descriptions of a particular system because they have an experienced frame of reference from which to evaluate the information that they have read. Because I have served on the Membership Review Committee of the Association of American Law Schools, I am also able to explain how accrediting and membership organizations for law schools in the United States have an important effect on legal education in this country.²⁹ The challenge in this chapter will be to update the readings to account

²⁶ <http://www.ena.fr/> (last visited April 13, 2010).

²⁷ There are nine such institutes throughout France, organized under the umbrella of the *Science Politiques, or SciencePo* structure, which is composed by the National Foundation for Political Science of France and the Paris Institute for Political Studies. <http://www.sciences-po.fr/portail/> (main page) and <http://www.sciences-po.fr/portail/fr-fr/decouvrir-sciences-po/les-gouvernements-de-sciences-po1/> (organizational structure page) (last visited April 13, 2010). For information in English, see <http://admissions.sciences-po.fr/> (last visited April 13, 2010).

²⁸ For the current composition, and links to their basic biographies, see <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/the-members/the-members.25737.html> (last visited April 12, 2010).

²⁹ The AALS is a voluntary membership organization that groups most law schools in the United States. The requirements of membership have an important effect on how the law schools are organized and managed. See generally <http://www.aals.org> (last visited April 14, 2010). The Membership Review Committee “examines law school applications for membership in the

for major changes in legal education, especially in Europe under the guidance of the Union, and in important places such as Japan, which overhauled its system in 2004.³⁰ But the basic pedagogical value of the discussion should remain strong.

5.LEGAL PROFESSIONALISM IN THE CIVIL LAW WORLD

This is the second chapter that takes advantage of the students' experience, and of their expectations for their futures after law school, to conduct a more in-depth case-study. I usually start by discussing that passage rates for the examination that allows entry into the official legal professions in Japan was for decades in the range of three percent (03%).³¹ Most of my students quickly point out that they would not be in law school if they thought that their chances of becoming members of the bar were that low, but they also immediately figure out that the majority of law graduates in Japan must be doing something other than official practice with their degree. But I also warn students that other limitations such as *numerus clausus* provisions may limit the number of persons allowed to practice any particular profession, regardless of exam-passage.³² This has important effects on the legal services sector abroad, and may require U.S. counsel to go to a very particular professional in another country —such as a notary or attorney

Association and sabbatical evaluation reports of member law schools[; and] makes recommendations to the Executive Committee on the actions it should take.”

³⁰ See generally James R. Maxeiner, Keiichi Yamanaka, *The New Japanese Law Schools: Putting The Professional Into Legal Education*, 13 PACIFIC RIM L. & POLICY J. 303 (2004); Norbert Reich, *Recent Trends In European Legal Education: The Place Of The European Law Faculties Association*, 21 PENN. STATE INT'L LAW REV. 21 (Fall 2002) (discusses the “Bologna process” of reforming legal education in Europe).

³¹ In Japan, completion of a two-year apprenticeship program in the Legal Training and Research Institute administered by the Supreme Court is a prerequisite to admission to practice as a litigator as well as for appointment as either a career judge or procurator. In 2004, the legal education system was overhauled to increase the number of persons who could be trained for these professions. See generally James R. Maxeiner, Keiichi Yamanaka, *The New Japanese Law Schools: Putting The Professional Into Legal Education*, 13 PACIFIC RIM L. & POLICY J. 303 (2004). See also Tomoya Ishikawa, Mitsusada Enyo and Daisuke Nakai, *Law Schools Troubled by Bar Exam Failure Rate*, *The Asahi Shimbun*, October 27, 2009 (“The new graduate-level law schools are averaging a 27% pass rates, up from the traditional 3%” ... “using the new bar exam introduced in 2006.”) (available at <http://www.asahi.com/english/Herald-asahi/TKY200910270110.html> (last visited April 9, 2010)).

³² Denis-M. Phillipe & Helen Roberts, *The Legal Professions in Belgium*, in *THE LEGAL PROFESSIONS IN THE NEW EUROPE* 69, 94 (Tyrell & Yaqub, eds., 1993). There is a modern trend towards liberalizing the profession by allowing all law graduates who pass the notary bar to practice as notaries. This trend has been most prevalent in Central America. See Jose Guglietti, *La Comision de Asuntos Americanos (CAA) y los Notariados de America Latina*, in *ATLAS DU NOTARIAT* 334g-334i (1989). Puerto Rico also allows all lawyers who pass the Notary Bar exam to practice both professions at the same time, and they may do so throughout the island. Malavet-Vega, *supra* note 27, at 29.

admitted to practice before the French courts of appeal, which have highly limited exclusive bars and compulsory fee schedules.

Additionally, comparative analysis can help achieve social justice in the United States. I illustrate this for my students by pointing out that misconceptions about notaries and their functions here in the United States have allowed unscrupulous persons to take advantage of U.S. citizens of foreign origin and aliens seeking entry to or living in the United States.³³ A simple search of news reports that I conducted some years ago disclosed many instances of fraud perpetrated by notaries who took advantage of foreign immigrants or potential immigrants, by misleading them into believing that they could provide legal services, or that their services had the same legal effect in the United States as in the home countries of the duped immigrants.³⁴ Successful prosecutions for illegal practice of law have also been instituted against persons who have used the title “Notario Publico”³⁵ to mislead clients into believing they could deliver legal

³³ “Because immigrants are unaware that notaries in the United States simply certify documents [and are not legal professionals], they may be deceived by notaries who charge high fees for services they often cannot perform.” Gail Appleson, *Unscrupulous Notaries Spur Chicago Probe*, 68 A.B.A. J., Nov. 1982, at 1357. This Article lists instances of immigrants being defrauded by US notaries who mislead them into believing that they are the legal professionals that notaries are in their countries of origin. But money is not the only thing that they could lose. “In some cases a notary may intend to help but can’t because of his lack of legal knowledge... “Notaries don’t inform clients of proper procedure and the aliens are deported,’....” Id. The article reported similar instances of abuse in Chicago and Los Angeles. Id.

³⁴ See, e.g., Patrick McDonnell, *Victimized Brothers Help End Immigration Scam*, Los Angeles Times, San Diego County Ed., Aug. 4, 1991, Metro sec., at 1 (stating Latino immigrants defrauded in part by official-looking notarized documents and by advertisements by “immigration consultants” and “notarios publicos”); Alexander Peters, *Notaries Bilking Immigrants; Aliens Think They’re Hiring Counsel, But Buy Trouble Instead*, Recorder, Feb. 1, 1991, Alien Justice sec., at 1 (stating, that notaries have violated advertising and pricing laws, and attorneys representing immigrants in asylum claims estimate that 50 to 80 percent of their cases have been tainted by the work of notaries and non-lawyers. The best case scenario for these aliens is that they only lose their money, but in the worst cases, they are deported); Constanza Montana, *New Immigration Laws Cause New Set Of Problems For Aliens*, Chi. Trib., Dec. 11, 1987, Chicagoland sec., at 14 (reporting that the Cook County state’s attorney’s office “has filed two “class action-type’ suits against two notaries who have committed fraud by posing as attorneys and handing out incorrect information to immigrants”); Bob Schwartz, *Protesters Say Notaries are Defrauding Aliens*, Los Angeles Times, Orange County ed., Apr. 2, 1987, Metro sec., part 2, at 1 (stating that 75 members of an immigrant’s rights group protested in Santa Ana, California against fraudulent practices by notary publics, and that a recent investigation by the Los Angeles Times discovered notaries who charged over 100 times the state limit to complete state immigration forms, charged between \$ 300 and \$ 1,000 to process amnesty cases, provided erroneous advice that could potentially undermine amnesty cases, practiced law without a license, and advertised that they were both notaries and immigration consultants, which state law forbids).

³⁵ In Spanish, the Latin Notary is referred to as “notario publico,” which would literally translate to “notary public” in English.

services.³⁶ State laws generally prohibit misleading advertising³⁷ and the practice of law by notaries.³⁸ However, this problem has been significant enough to lead several states to enact more specific laws that require notaries to indicate that they are not lawyers when advertising in a language other than English,³⁹ and to prohibit the literal translation of the title “notary public” to the Spanish “Notario Publico.”⁴⁰ This problem has been particularly prevalent in my current home state of Florida.

³⁶ See, e.g., Fla. Bar v. Isabel Rodriguez, 509 So. 2d 1111 (Fla. 1987) (stating that “the [Spanish-language newspaper] advertisement indicated ABC General Services employed a ‘Notario Publico,’ and offered services in immigration, corporations, divorce, and income tax” (emphasis added)); Fla. Bar, v. Alfredo Borges-Caignet, 321 So.2d 550, 551 (Fla. 1975) (stating that the “Respondent had represented himself to be a Notario Publico (which the witness related her understanding of same to be “something with laws”), and in such position could act as her attorney for the purpose of obtaining legal permission to remain in the United States” (emphasis added)); The Florida Bar v. Nicholas F. Fuentes, 190 So.2d 748, 750-51 (Fla. 1966) (stating that using terms, such as “Notaria,” “Notario Publico” and “Consultoria” were misleading to the Cuban clientele of the Respondent and to his clientele native to other Spanish speaking countries, because these terms purported that the Respondent was an attorney authorized to provide services generally rendered by an attorney admitted to the Florida State Bar); and The Fla. Bar v. Marco Tulio Escobar, 322 So.2d 25 (Fla. 1975).

³⁷ See, e.g., Cal. Gov’t Code 8214.1(f) (West Supp. 1998); Colo. Rev. Stat. 12-55-107(1) (West1996); Fla. Stat. ch. 117.01(4)(e) (West 1996); Idaho Code 51-112(c) (Michie 1994).

³⁸ See, e.g., Cal. Gov’t Code 8214.1(g) (West Supp. 1998); Fla. Stat. ch. 117.01(4)(f) (West 1996); Idaho Code 51-112(d)(Michie 1994); Mo. Rev. Stat. 486.390(1) (1987); N.M. Stat. Ann. 14-12-13 (A)(5) (Michie 1997); W. Va. Code 51-1-4a (1997); “A realtor or notary public, who prepares legal instruments for another, is engaged in the practice of law.” 45 Ops. Att’y Gen. 488 (1953);” Wis. Stat. 137.01(8) (West Supp. 1997) (“If any notary public shall be guilty of misconduct or neglect of duty in office the notary public shall be liable to the party injured for all the damages thereby sustained.”).

³⁹ See, e.g., Cal. Gov’t Code 8219.5 (West Supp. 1998) (discussing “advertising services in language other than English”). See also Nev. Rev. Stat. 240.085 (Michie 1995) (stating that “advertisements in language other than English [must] contain notice if notary public is not an attorney”). Whether these statutes are effective is uncertain, however. See also Office of Prof’l Standards, State Bar of Cal., Report of the Public Protection Comm. 8 (1989). This report was discussed in Meredith Ann Munro, Note: Deregulation of the Practice of Law: Panacea or Placebo?, 42 Hastings L.J. 203, 221, n. 91 (1990). The authors of the Report and Ms. Munro advocate, although not with equal enthusiasm, authorizing the lay practice of law, but both caution that special care had to be taken to prevent unscrupulous notaries from misleading immigrants and non-English speakers. *Id.* at 244-45.

⁴⁰ See, e.g., Cal. Gov’t Code 8219.5 (West Supp. 1998) (discussing the literal translation of the phrase “notary public” into Spanish is prohibited). See also, 19 Or. Rev. Stat. 194.162 (5) (1991) (stating “[a] person may not use the term “notario publico” or any equivalent non-English term, in any business card, advertisement, notice, sign or in any other manner that misrepresents the authority of a notary public”); Tex. Gov’t Code 406.017 (West 1990); The Fla. Bar v. Nicholas F. Fuentes, 190 So.2d 748, 750-51 (Fla. 1966) (discussing the court enjoining the literal translation of “Notary Public” to the Spanish “Notario Publico” or the use of the Spanish words “Notaria,” i.e., a notary’s office, because they were misleading persons into believing that the user was a legal practitioner).

In the United States, there is one kind of lawyer who is generally expected to be an advocate for his client. Generally speaking, legal specialization here is a matter of custom and practice, and the government does not impose legal specialization or exclusivity on practitioners or clients.⁴¹ In most civil law countries, however, governmentally designated legal specialties are the norm.⁴² These differ from the voluntary specialty certification systems in the United States because they limit the practitioners to work exclusively in their area of licensed expertise, whereas certifications in the United States do not limit the areas of law that a member of the bar may otherwise practice.⁴³ Additionally, clients in the United States are not required to choose a specialist whether they be self-designated or bar-certified. But in Europe clients are legally required to seek the services of certain specialized professionals by governmental mandate. The closest common law analogy that might be drawn would be between the Solicitor and Barrister distinction made in England and Wales in the United Kingdom,⁴⁴ although I do not find this an especially helpful example with my U.S. students. I introduce my students to the official, governmentally defined legal specialties that are common outside of the United States and to the admission, regulation and ethical requirements that apply to each.

I also point out that in the United States the government is not a major employer of legal professionals—with about eleven to thirteen percent of our law-trained people being employed by the government—when compared to Europe,

⁴¹ One rare example of substantive law specialization that is governmentally enforced is the patent bar. 35 U.S.C. sec. 31.

⁴² See generally Hamish Adamson, *FREE MOVEMENT OF LAWYERS* (1992) (discussing the extent of legal system specialization within the European Union).

⁴³ The Florida Bar, for example, has 24 “certified” specialties. <http://www.FloridaBar.org/certification> (“A lawyer who is a member in good standing of The Florida Bar and who meets the standards prescribed by the state’s Supreme Court may become board certified in one or more of the 24 certification fields.”) (last visited April 17, 2010).

⁴⁴ “A solicitor acts as a legal adviser to his clients and conducts legal proceedings on their behalf, instructing a barrister to advise and to conduct cases in court when necessary.” Stephen O’Malley, *EUROPEAN CIVIL PRACTICE* 1456 (1989). The Barrister, generally speaking, is the legal expert and litigator; he “is to act as legal consultant and as an advocate in court.” *Id.* at 1458. The barristers are increasingly specialists in particular fields of law who advise solicitors and present cases in court. Zahd Yaqub, *The Legal Professions in the United Kingdom*, in *THE LEGAL PROFESSIONS IN THE NEW EUROPE* 300, 303 (Allan Tyrell & Zahd Yaqub eds., 1993). The solicitors do not have a mandatory monopoly over legal advice, just their status as certified legal professionals. *Id.* at 325. In litigation, both solicitors and barristers are allowed to subscribe pleadings. *Id.* at 311. The barrister is sometimes given the exclusive right to appear in court, although solicitors may also appear in certain lower courts or on appeals. *Id.* The Barrister must usually be brought in to represent a client by a solicitor, but he may also be retained by a foreign attorney in certain cases. O’Malley, *supra*, at 1458-59. Other than the the foreign-lawyer exception, however, the solicitor, effectively acts as a barrier between the barrister and the general public, since the barrister may not approach clients directly and must be brought in by a solicitor. Yaqub, *supra*, at 317.

where the government may employ almost half of law graduates.⁴⁵ This employment picture reflects fundamental differences in the allocation of legal resources, with the Europeans dedicating a larger portion to publicly funded uses of legal services. I like to relate the readings for my comparative law class to other courses that I teach, so I point out how these choices might reflect the contrasting values of the different civil procedure systems. In Europe, they may have to hire larger numbers of judges required to manage judge-driven inquisitorial fact-gathering in civil litigation. In the United States, on the other hand, we shift discovery in civil cases to the initiative and financing of the parties, rather than the court, and a majority of cases settle without the need of a trial; thus, we need relatively fewer judges.

I finish this chapter with a discussion of the ethical concerns, and dangers, posed by the multiple legal professions outside the United States. In particular, I warn students that the adversarial ethic generally, and attorney-client privilege rules in particular, may be radically different for some of the legal professionals with whom they may interact as counsel. Notaries, for example, will have a duty to disclose facts to the other parties to the transaction that an American lawyer would not. The secrecy of notarial transactions could be analogized to the attorney-client privilege only as to third parties not involved in the juridical act contained in the public document.⁴⁶ For example, a notary has an obligation to notify a buyer of a defect in the seller's title, and of any encumbrances over the property. The notary is also allowed to inform non-parties to a transaction of defects in title and encumbrances that should be reflected in a public registry, even if a party to the transaction conveys this information to the notary.⁴⁷ Even more importantly, the

⁴⁵ The American Bar Foundation reported that for the year 2000 general government and judiciary employment of attorneys accounted for 11% of overall legal employment, the same as it was in 1991 and up from 13% in 1980. The numbers are taken from the American Bar Foundation's Lawyer Statistical Report for 2004, and are summarized in the "Demographic information" page in the ABA's statistics page. http://new.abanet.org/marketresearch/PublicDocuments/Lawyer_Demographics.pdf (last visited April 13, 2010).

⁴⁶ The contents of a public document are secret material that may not be shown or otherwise divulged to third parties. Copies of public documents in the *protocolo* (the collection of original public documents that must be maintained by each notary or notarial office) may be issued only to interested parties as discussed below. Likewise, information from the *protocolo* may be read or divulged only to interested parties, as defined by law. Pedro Malavet-Vega, *MANUAL DE DERECHO NOTARIAL PUERTORRIQUEÑO* 121 (1987). Notarial wills, however, must remain totally confidential until after the death of the testator. *Id.* The one exception to this rule is that the notary may divulge the admission of paternity of a "natural child." *Id.* Violation of the secrecy of the *protocolo* may result in criminal prosecution. *Id.*

⁴⁷ See, e.g., Jean Yaigre & Jean-Francois Pillebout, *DROIT PROFESSIONNEL NOTARIAL* 134-136 (1991).

notary has an affirmative obligation to search the public registry for information relevant to the transaction, and to disclose it to the parties.⁴⁸

Therefore, an attorney may inadvertently disclose client-confidential information to someone he or she believes is covered by the privilege, simply because they are a fellow legal professional. This is just one example of the ethical landmines that comparative law can help us to avoid.

6. THE MAGICAL HISTORY TOUR

After covering subject areas that are particularly within the students' level of experience and interest, I take them back to the historical origins of the Civil Law Tradition for five chapters. Professor Merryman divided the Civil Law Tradition into a series of historical subtraditions, namely: 1) Roman civil law; 2) Canon Law; 3) Commercial Law; 4) The Revolution; and 5) Legal Science.⁴⁹ This part of the course attempts to educate my United States students to understand what these subtraditions mean.

I start with Roman law in a chapter titled *The Roman Law Roots of the Civil Law Tradition*. I want the students to understand that the civil law tradition very much sees itself, accurately, as the legal heir of 25 centuries of legal development, and that we can identify still-active legal rules that date back at least to the Twelve Tables in the middle of the 5th Century BCE.⁵⁰ I also want to show them how to conduct historical legal research, which, I point out, may well be relevant to their own practices. For the latter I use the example of the recent line of cases on the Sixth Amendment that have revolutionized the field of Evidence — another of my basic courses— in majority opinions authored by Justice Antonin Scalia who makes extensive use of historical analysis to justify the court's ruling.⁵¹

⁴⁸ See, e.g., *In re Ramos Melendez y Cabiya Ortiz*, 120 P.R. 796 (1988) (holding that a notary who failed to make his own title search and instead relied on a three-month-old certification violated professional ethics standards).

⁴⁹ John Henry Merryman, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* at 6 (2d ed. 1985). See also John Henry Merryman, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (1969) (the seminal first edition of this influential book), and John Henry Merryman and Rogelio Pérez-Perdomo, *THE CIVIL LAW TRADITION, AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* (3rd ed. 2007). As I discuss in the conclusion, I eschew commercial law from my coverage.

⁵⁰ See <http://www.fordham.edu/halsall/ancient/12tables.html> (an online database on ancient law, including the Twelve Tables) (last visited April 14, 2010).

⁵¹ See, e.g., *Crawford v. Washington*, 541 U.S. 36 (2004) (adopting the “testimonial” view for applying the Sixth Amendment’s Confrontation Clause); *Davis v. Washington*, 547 U.S. 813 (2006) (fully overruling *Ohio v. Roberts* by applying the “testimonial” view whenever out of court statements are offered into evidence over a hearsay and confrontation objection); *Giles v. California*, 128 S. Ct. 2678 (2008) (defining the “forfeiture by wrongdoing” exception to the Confrontation Clause’s bar on the use of testimonial statements); *Melendez v. Massachusetts*, 129

The next chapter is *The Legal Renaissance: Legal Custom, Local Compilations and the Birth of Canon Law*.⁵² Preliminarily, I discuss the survival of Roman law and its displacement as living law by customary law following the fall of the western roman empire. Then I discuss how a Legal Renaissance produced the modern European liberal arts university. Starting in Bologna in the Twelfth century,⁵³ rediscovered Roman texts generate an academic study of law. This is quickly supported not only by temporal rulers in need of trained professionals to serve in their courts, but also by the Roman Catholic Church. However, conflicts between the Church and the temporal rulers lead to the development of competing Roman and Canon laws, although they were studied side by side in Bologna where the typical graduate would become a “doctor of both laws.” It is difficult to understand the development of European law generally, and in certain fields fields in particular —especially criminal, family, inheritance, and contract substantive law, and of procedure generally— without a rudimentary understanding of Canon law and its development and influence.

Substantively, I focus on family and inheritance law subjects, which I illustrate with references to Roman and Canon law sources. I also use one particularly well-developed medieval code, the Spanish *Siete Partidas*, to illustrate how the law was incorporated into the national legal order during this transitional period.⁵⁴ I use the power of *patria potestas*, for example, to illustrate the evolution of absolute, male dominated parental power, to the modern obligation to provide for your children. I use inheritance generally, and the concept of forced heirship in particular, to illustrate the civil law tradition’s approach to obligations, both formal and moral. Pedagogically, I also find that I need to account for widely varying

S. Ct. 2527 (2009) (applying Crawford and its progeny to bar the use of certificates signed by state laboratory analysts in evidence as violative of the Confrontation Clause).

⁵² The current Code of Canon Law is that of 1983, which was produced as a result of the Second Vatican Council. The code is available for review at http://www.vatican.va/archive/ENG1104/_INDEX.HTM (last visited April 9, 2010).

⁵³ Hence the choice of Bologna by the European Union for its “Bologna Initiatives” on the future of legal education in the Union. See generally http://ec.europa.eu/education/higher-education/doc1290_en.htm (last visited April 13, 2010). See also Reich, *Recent Trends In European Legal Education*, supra note 130 (discusses the “Bologna process” of reforming legal education).

⁵⁴ The *Código de las Siete Partidas* has been described as “a work generally known as a medieval legal treatise and called ‘the first extensive compilation of western secular law since Justinian.’ ” MARILYN STONE, *MARRIAGE AND FRIENDSHIP IN MEDIEVAL SPAIN* 1 (1990), citing Charles Sumner Lobingier, *Introduction*, in ALFONSO EL SABIO, *LAS SIETE PARTIDAS* vi (Samuel Parsons Scott, trans. 1931). They were drafted under the patronage and probably the supervision of King *Alfonso X, El Sabio*, of Spain during the thirteenth century. *Id.* at 1-22. Some experts believe that the Partidas did not become effective law until the 1348 *Ordenamiento de Alcalá*, see, e.g., David & Brierley, supra note 11 at 57, but others hold that they “were being used extensively as a book of reference by royal judges before 1348.” STONE, supra at 10, citing EVELYN S. PROCTER, *ALFONSO X OF CASTILLE PATRON OF LITERATURE AND LEARNING* 51 (Reprint 1980).

degrees of historical education among my students. This means using every means available, especially with this generation of students online, web-based systems, to supplement the readings. I provide students with basic summaries of historically significant events and figures, maps, and listings of reliable online resources that might help them to understand the assigned reading.

In the next chapter of the tour I reach the modern civil codes in a chapter titled *The Codification Process*. Here I focus on the French code, and to a lesser extent on those of Germany and Spain. But first I particularly emphasize the French Revolution, and its influence on French attitudes towards the judiciary as a case study in legal culture and its historical roots. In this area I discuss the fiscal crisis of the French state and how it was largely related to their financing of *our* revolution. I also explain the convocation of the Three Estates as a result of the actions of the *Parlement* of Paris by providing a more general discussion of the regional *Parlements* and how these bodies were seen by the revolution as the power of judges run amok, hence the French aversion to a *gouvernement de juges*.

I conclude this section by discussing the passage of the French *Code Civil* under the careful attention of Napoleon Bonaparte to illustrate the very particular conditions under which the early Codes were passed. Although the revolutions of this period produced the Declaration of the Rights of Man and the Citizen and several constitutions, the most enduring legal product of the period are the civil codes, and in particular the French *Code Civil*. In France, the revolution ingrains in the French legal psyche a particular attitude towards the role of the judiciary in a truly free society of elected legislators and executive officials that is quite hostile to a powerful judiciary in general and to *stare decisis* in particular.⁵⁵

I will also include a section on the development of the German code, as it is related to the concept of “legal science” in comparative law, and thus is a very important variant of the civil law tradition. I also hope to include a section on the Spanish Civil code and on the influence of Spanish law in its former colonies, especially in the Americas. I would cover these two subjects in the three-credit version of the course and would likely not do so in the two-credit course. But I would hope to provide useful information on two important historical variants of the civil law tradition.

The final chapter of the tour is *The Modern European State: From Positivism back to Universalism?* This chapter brings the course into the modern age. It is a transitional chapter in which I describe the role of the state and state-formation in the civil law tradition.

⁵⁵ See, e.g., Article 5 of the French Civil Code: “Judges are forbidden to pronounce decisions by way of general regulatory provisions on cases that are submitted to them.” Compare Article 1 of the Swiss Civil Code: “The law regulates all matters to which the letter or the spirit of any of its provisions apply. In the absence of an applicable legal provision, the judge pronounces in accordance with customary law and, in the absence of a custom, according to the rules that he would establish if he had to act as legislator. He is guided by the solutions consecrated by juristic opinion and case law.”

The modern European nation states on which I focus are the product of a spirit of nationalism and the notion of state positivism as the only legitimate source of national law that developed mostly during the 18th and 19th centuries. The nationalization of law displaced the old universal systems of Roman and Canon law—and to a lesser extent of regional customs—with new laws enacted by the central state. But today Europe has returned to a limited but very important type of Universalism mostly as a result of the obligations of membership in the European Union.⁵⁶ At the same time, many countries also face internal challenges to the power of the central government that have an important effect on law. This latter phenomenon is developed further in the federalism discussion of the next chapter.

In the United States, we have the unfortunate habit of teaching law as if it were made fresh daily by judicial decisions. We therefore tend to ignore the importance of statutory law, which is indeed quite influential in and prevalent throughout the United States. But these chapters are intended to counter the de-historicizing of law generally and of our long constitutional legal history and stability in particular. We can therefore benefit from studying rules of law that are still in effect today, even in the United States, that have ancient roots. More generally, we can and should learn that current rules and attitudes towards law are framed by the historical experiences that produced them. I emphasize, for example, that federal court jurisdiction was greatly expanded following the Civil War, when for the first time the U.S. courts are given jurisdiction over Federal Question cases, something that had not been granted in the original Judiciary Act of 1789.⁵⁷ Understanding the importance of historical awareness makes us better students of all law, even, or perhaps especially, our own.

⁵⁶ See generally, Josephine Steiner, Lorna Woods and Christian Twigg-Flesner, *TEXBOOK ON EC LAW* (Oxford University Press 8th ed. 2003). See also *Van Gend en Loos*, case no. 26/62 (European Court of Justice 1962) (the highest court in the EU rules that “the Community [now the EU] constitutes a new legal order in international law, for whose benefit the [member] States have limited their sovereign rights, albeit within limited fields.”); and *Costa v. ENEL*, case no. 6/64 (ECJ 1964) (ECJ rules that “The transfer, by Member States, from their national orders in favour of the Community order of the rights and obligations arising from the Treaty, carries with it a clear limitation of their sovereign right upon which a subsequent unilateral law, incompatible with the aims of the Community, cannot prevail.”)

⁵⁷ Currently, these jurisdictional statutes are in 28 U.S.C. sec. 1332 (diversity and alienage subject-matter jurisdiction) and 28 U.S.C. sec. 1331 (federal question subject-matter jurisdiction). While diversity had been included in the first judiciary act, it was not until 1875 that federal question was added as a basis of original subject matter jurisdiction for federal trial courts. See generally, Erwin Chemerinsky, *FEDERAL JURISDICTION* at 18 and 24 (1989).

7. CONTEMPORARY NATIONAL LEGAL SYSTEMS

This chapter starts a new part of the course that covers the modern states, their basic political and legal structure, and the role of constitutional law and its enforcement in the lives of its citizens.

I cover this subject as a fundamentally twentieth century phenomenon generally and as post-World War II reality in particular. The birth of the modern constitutional states in western Europe was fundamentally affected by the World War everywhere except possibly Spain, which provides a more recent development of a new constitutional culture. I purposely avoid the eastern European experience generally, and the socialist law variant in particular. I focus rather on the constitutional structure of the country's government and in the organization of its legal system in western European democracies. Federalism is a matter of special interest and I try to impress upon my students that there are many approaches that are different from our own. My primary case studies have been France's 1958 Constitution of the Fifth Republic and Germany's Basic Law of 1949.

By way of introduction, I remind students that the revolution produced a particularly French approach to the concept of separation of powers. Whereas in the United States we have it as dogma that there are three separate and co-equal branches of government, the French see only two. Specifically, the French system eschews the ordinary judiciary from the listing of government powers, leaving the democratically elected branches, legislative and executive, as the only ones with constitutional legitimacy, especially when judging the legality of administrative or legislative acts. This is reflected in a general prohibition against *stare decisis* and the allocation of judgments over the legality of administrative action to the administrative courts headed by the Council of State,⁵⁸ rather than to the ordinary judiciary, and the allocation of constitutionality review of legislation to the Constitutional Council.⁵⁹ By contrast, most other European nations take a very different view of these concepts, and allocate the power over constitutionality review to their ordinary courts, although Germany, Italy and Spain, for example, have given the final word on constitutionality to specialized constitutional courts.

This brief overview is followed by a more detailed look at court structure and procedure, with particular emphasis on their relationship with the legislative and executive powers. I start the process with readings dedicated to the structure of the French legal system. Initially, I present a description of appellate procedure generally by using texts specific to France's ordinary and administrative appellate procedure, as they have been attacked in, and modified as a result of, litigation

⁵⁸ See generally <http://www.conseil-etat.fr/cde/> (last visited April 13, 2010).

⁵⁹ See generally <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/homepage.14.html> (the council's own English-language website) (last visited April 13, 2010).

before the European Court of Human Rights.⁶⁰ I then use the controversy over the banning of religious symbols in French public schools, particularly as applied to the muslim *hijab* (veil or headscarf), to illustrate the administrative process in that country, and its limited power to protect a religious minority.⁶¹ The ordinary court process in the system headed by the Court of Cassation, and administrative adjudication in the system headed by the Council of State, offer an illustration of the French distrust of the ordinary judiciary to decide the legality of administrative action. The existence of the Constitutional Council—which is anticipated here, but discussed in the next chapter—illustrates the severe limitations imposed by the French constitution on the possible invalidation of legislation.

In addition to separation of powers, another general topic that I try to emphasize for the students in this chapter is federalism. France is an example of a hyper-centralized state in which the national government has basically all the power to legislate, regulate and judge. Germany, on the other hand, has a strong federalized structure, with its *länders* becoming a major player in the business of national government as a direct participant, rather than with the parallel federal and state systems that prevail in the United States. Spain represents an interesting modern trend of allowing regions to develop local autonomy within a basic national constitutional structure.⁶² I would like to greatly expand this chapter to provide a more inclusive overview of the governmental and then judicial structure of several countries. I would likely still focus on a few countries, particularly France, Germany and Spain, in order to keep the readings accessible and manageable for the students. But I think that it is important that I develop the text myself, in order to make it easier for my students to understand. I also find that France's purposeful choices regarding separation of powers and constitutionality review make a terrific contrast to our practices that forces students to consider our own system more carefully.

I am considering adding a section on comparative procedure to this chapter, or perhaps creating a separate chapter on comparative procedure. This section or chapter would provide an overview of comparative ordinary civil, criminal and administrative procedures. Constitutional adjudication processes would still be discussed in a separate chapter described below, but I would incorporate cross-references to those processes here whenever pertinent. The most common system of introducing constitutional adjudication into the ordinary processes is the “reference” procedure by which an ordinary court forwards a constitutional question arising in a case before it to a constitutional adjudication

⁶⁰ See Mitchel de S.-O.-l'E. Lasser, *The European Pasteurization Of French Law*, 90 CORNELL L. REV. 995 (2005).

⁶¹ See Elisa T. Beller, *The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society*, 39 TEX. INT'L L.J. 581 (2006).

⁶² Article 143 of the Spanish Constitution of 1978 allows the creation of autonomous communities with authority over matters listed in Article 148 and subject limitations in Art. 149. <http://constitucion.rediris.es/legis/1978/ce1978.html> (last visited April 12, 2010.)

body. The German Constitutional court has such a system, and it indeed produces most of the constitutional questions decided by it —initially much to the surprise of the drafters of their constitution.

The French Constitution was amended in 2008 for the first time to permit some type of reference from the ordinary civil and administrative courts to the Constitutional Council. The implementing legislation took quite some time to pass, with the first individual reference cases heard by the council in March of 2010. The primary reason for the delay appears to have been how to limit the number of cases that are referred to the council from the ordinary and administrative courts.⁶³ Although this new system is revolutionary for France, the concern over the volume of appeals and inherent case delay is not unique. In Brazil, for example, many judges express concern about the use of compulsory constitutional review as a delaying tactic in otherwise ordinary processes and are interested in implementing some sort of discretionary review system, such as the *writ of certiorari* used by the U.S. Supreme Court.⁶⁴ I use these examples to illustrate how our constitutional experience continues to influence constitutional systems around the world. I also want the students to see that political and governmental structures can vary from our own and ask them to consider the reasons for the differences. Lastly, they once again see our own system from a more theoretical and detailed perspective.

8.CONSTITUTIONALITY REVIEW: CASE STUDIES

I dedicate the final chapter of my course to “constitutionality review.” I carefully avoid any other label in order to impress upon students the varying nature of review of the constitutionality of acts by the legislative, the executive and judicial powers. I am also mindful of the distinction between the ordinary judiciary and the executive adjudication system, especially in France, as covered in the previous chapter. The chapter currently provides a general overview of constitutionalism and constitutionality review, which I follow by a more detailed look at the German Federal Constitutional Court and the French Constitutional Council. I would also like to add references to other constitutional courts, especially that of Spain.

When the German Constitutional court was originally created, it was divided in the two *Senats* that it currently has. But it was generally expected that one Senate would only handle individual complaints in concrete norm control. They expected that the overwhelming majority of claims would come from the political process, meaning that minorities in parliament and dissenting members of the government would use abstract norm control to insert judicial review into the legislative process. But the reality was that over 97% of the filings came from individuals involved in actual cases, i.e., as concrete norm control. So they had to

⁶³ See note **Error! Bookmark not defined.** infra and accompanying text.

⁶⁴ See generally 28 USC sec. 1257.

reallocate responsibility over those cases by dividing them more or less equally between the two Senates, using the litigant's last name to split them alphabetically.⁶⁵

In France, the Constitutional Council was not conceived as a judicial body at all. Rather, it is primarily staffed by persons with distinguished careers in political office or the professional bureaucracy. Indeed, few of the appointees have held high office in the ordinary magistrature (judiciary), but almost all are former students or graduates of either the *Ecole Nationale D'Administration* or one of the *Instituts D'Etudes Politiques*, or from both types of graduate schools, and these schools are designed to train future politicians and public servants not associated with the judiciary.⁶⁶ But even the French have decided that political minorities should be given the opportunity to access the Constitutional Council. Thus, in 1974, they amended the constitution to allow any 60 members of parliament to summon the Council. But the "veils" controversy, which produced a statute that passed with only 48 dissenting votes, led to a political reconsideration of the rights of political, and in this case racial, ethnic and religious minorities. Thus, as discussed above,⁶⁷ in 2008, the constitution was once again amended to allow some references to the Constitutional Council at the request of individual litigants in both the ordinary and administrative courts. The organic act implementing this legislation took some time to pass and the first referred cases were heard in the spring of 2010.

C. PEDAGOGICAL ASSESSMENT: AN EXAM QUESTION

At the end of the course that I have described in the previous section, my favorite final exam exercise is to ask students to reconsider and, if they wish, redesign the U.S. constitutionality review system by using the comparative European examples that we discussed in class. This forces the students to consider whether the cooperative appointment process of having the President nominate with the advice and consent of the Senate is the best way of doing things in our system. Age or term limits for justices always generate very interesting discussion, with most students favoring one or the other. Almost no student has ever advocated the total elimination of concrete norm control in the U.S., but a large

⁶⁵ See generally <http://www.bundesverfassungsgericht.de/en/index.html> (English language site) (last visited April 13, 2010).

⁶⁶ I discussed this above at notes 126-128 and accompanying text.

⁶⁷ See generally <http://www.assemblee-nationale.fr/english/8ab.asp> (the text of the constitution in English, with amendments, including those of July 23, 2008, creating the new reference procedure) (last visited April 12, 2010). Article 61-1 of the constitution, passed in 2008, provides: "If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'État or by the Cour de Cassation to the Constitutional Council, within a determined period." *Id.*

percentage of the class has favored adding some type of abstract norm control. The students are also instructed to discuss the educational qualifications of the members of the tribunal, which forces them to reconsider the general legal education, and ethic, taught in U.S. law schools, and contrast it with the highly-specialized training and education programs for practitioners, administrative lawyers and judges in many western European countries.

The examination is a take home test and the students are permitted to use any research tool available to them, including discussing the material with each other. This is subject, however, to a strict requirement of academic honesty and originality of their work, which I am easily able to enforce since I personally grade all the papers.

In this section, I will transcribe one of the forms of these exams, and provide a narrative discussion of the pedagogical motivations and expectations that led me to include each topic. The question will be designated by italics and the narrative in normal text. The exercise starts with a set of instructions for the students:

1) Show that you have a command of the material we covered in class that is pertinent to your answer. To this end, provide references to our casebook, web postings, and to your notes of our class discussion. ...

2) Appropriately identify your sources in your answer. ...

I ask students to reference their work for several reasons. First, it requires them to conduct basic research, if at least to double-check their notes. I also very specifically warn students against plagiarism, which, in this electronic age of cutting and pasting is quite serious, even if sometimes inadvertent. I also try to get them to be thoughtful about their choice of sources, especially when conducting electronic research. The world-wide-web is an incredible resource for any researcher, but we must be very careful. In the notes for this essay for example, I have purposely referenced many online resources, but mostly educational, governmental or organizational, i.e., from institutions that I know to be reliable. (I hope that my textbook and website will become a good bibliography for reliable online resources.) The references made by the students show me if I have been successful in instilling in them a proper weariness of online garbage. But they also show me that they are able to use comparative methodology to conduct their research in a very productive and proper manner.

3) Show that you can identify analogous United States or Non-U.S. legal concepts and materials that are the proper subject of comparative analysis. This may require you to conduct some modest research outside our class materials. Please keep it simple. ...

I want the students to use the foreign models that we studied in class to reconsider and review our own. This often requires them to go back to their first

year texts, to their university American History textbooks and to other resources. (I increasingly discuss the U.S. aspects with specificity, and I expect to include extensive descriptions of the U.S. system in my textbook.) I am especially delighted when they cite from the Federalist Papers to show how the founding fathers might have considered certain matters at the time of the drafting of our Constitution.

4) You are permitted to take one of two frames of reference: (1) that of United States law student or (2) that of a non-U.S. student. However, you are limited to the class discussion of the U.S., French and German constitutional systems, in order to keep you focused on a reasonably narrow area that was covered in the class materials.

This instruction accounts for the significant number of foreign students that take my course. For those students, the course becomes an introduction to United States law and I want them to be able to write their exam project accordingly.

5) Finally, you should discuss the factual or legal factors disclosed by your research in a thoughtful and original manner that shows your command of the material related to our course. This last part is especially important if you wish to earn a high grade. Remember the themes, perspectives and emphasis of our class discussions.

This instruction is a reminder to the students that they have been studying a legal perspectives course and that their individual use of those perspectives and their own take on the material that we covered is the best possible display of their grasp on the methodology of comparative law as I taught it to them.

This is followed by the actual question:

QUESTION

Draft and explain an amendment to the Constitution of the United States that will govern the resolution of disputes regarding the constitutionality of legislation issued by the United States Congress. In structuring your amendment and its discussion, you should consider and address the French and German constitutional systems and contrast them to the current U.S. system. You must address the following topics both in the language of the amendment and in your discussion of it:

I vary the specific assignment. Sometimes they write a memorandum to a senator, sometimes they write a law, sometimes they write an amendment to the constitution. I also limit or broaden the number of foreign systems that they may reference in comparison to the United States. This depends on the length of the essays that I want them to produce and will also reflect whether I taught a two- or a three-credit class. That said, the basic purpose of the question is generally the same.

(1) What type of body should be responsible for giving the final word on the constitutionality of executive, legislative or judicial action that is based on an act of congress?

Here I want them to consider whether they want a court at all as the arbiter of constitutionality. They are welcomed to consider the original French system of having courts refer questions of constitutionality to the national assembly if they wish. But they usually focus on the competing models of a non-judicial constitutional council and a specialized court such as the German Federal Constitutional Court, as opposed to our appeals-court model.

(2) What should be the number, qualifications, length of service and method of selection and appointment of members of this body?

Here I want them to consider why our Supreme Court is currently composed of nine justices. This usually generates discussion of FDR's "court-packing" attempt and the times when the number of justices was smaller than nine. I also want them to consider that you do not have to be a lawyer to be a justice and that there is no minimum age requirement for appointment. By contrast, the European courts sometimes have very strict minimum age and education requirements or a strict custom applicable to appointments. As for the appointments process, in the Federalist No. 76, Hamilton specifically addresses "co-operation" between the President and the Senate in the appointments process, language that I am happy to see students reference.⁶⁸ In Europe there are often unilateral appointments (in France and Spain for example). A few students will analogize to the French system of having the President of the Republic, the President of the Senate and the President of the National Assembly appoint members of the Constitutional Council, without the need for general legislative acquiescence. Others will follow the German system allocating appointment authority within the two houses of the legislative branch (Bundestag and Bundesrat) and requiring a supermajority for appointment. A few will analogize to the supermajority requirement to simply add a two-thirds majority requirement to the U.S. Senate's advice-and-consent role. In class, I generally discuss the confirmation votes for the *current* members of the Supreme Court, and point out that only Justices Thomas and Alito would have failed confirmation if a two-thirds vote was required.⁶⁹ Although term-limits, which are the norm in Europe, have not

⁶⁸ Alexander Hamilton, *The Federalist No. 76*, <http://www.constitution.org/fed/federa76.htm> (last visited April 13, 2010).

⁶⁹ I limit my class discussion to the current members of the court, though others in the past have also failed to garner a two-thirds majority and some were disapproved. A record of Senate votes on Supreme Court Nominees is available online at

been very popular with students, compulsory retirement ages have proved very common in the answer essays.

(3) Should the state and/or federal courts be allowed to determine the constitutionality of executive, legislative or judicial action that is based on an act of congress? If so, how? (e.g., the German Reference Procedure, or the U.S. "case and controversy" standard.)

Here the students have to consider whether or not to allow all courts at all levels to consider questions of constitutionality. They can take such power away completely, and allocate it to a body such as the Constitutional Council, or even to a separate Constitutional Court, but with exclusivity or with a reference requirement. Most students in the U.S. seem comfortable with our current system, but one of the most common additions is some type of abstract norm control to allow members of congress to challenge certain laws, as well as granting certain types of organizational standing to pursue such challenges. The students will usually illustrate these arguments by critiquing standing and case or controversy decisions by the U.S. Supreme Court. The "reference" procedure is not very popular with the U.S. students, although occasionally some may impose it on the state courts.

(4) How and when will matters be submitted to this body? (e.g., appeal from lower courts, reference procedure, citizen complaint, request for advisory opinion by those with special standing, like the President, the Speaker of the House, President of the Senate, any number of congressmen and senators, or equivalent state officials).

Here students have to decide how matters will reach their Supreme Court, Constitutional Court or Constitutional Council. Most U.S. students are comfortable with some kind of discretionary system in which the court itself exercises jurisdictional discretion. Variants usually cover exceptions to the case and controversy and standing rulings of the U.S. Supreme Court.

(5) What will be the effect of the decisions of the constitutional review body when interpreting the Constitution of the United States? (Please consider three areas: (1) In the same case, as to courts and parties involved; (2) Within the judiciary generally as "precedent"; and (3) As to the other branches of government (legislative, executive and judiciary) at both the state and federal levels.

The first item reminds the students that in France an appellate decision is not even binding on the lower trial or appellate court, until the court of appeals or

of cassation issues a second concordant ruling. They also need to consider whether cases will be returned to a different court upon remand, as is common in France, though it is unheard of in the United States. Then they often discuss the concept of precedent and *stare decisis*, as well as how and by whom they are defined. In the European examples that I show them, I emphasize that the legal effect of rulings is generally expressly set out in constitutional or statutory provisions. But in the United States the courts themselves define what *stare decisis* means. Lastly, they have to consider the effect on the legislative and executive branches. This last issue requires them to consider other concepts such as equitable remedies and against whom they may be directed, since in many civil law countries such remedies, especially injunctions and contempt, are severely limited and may even be unavailable against the other branches of government.

Finally, your discussion should be critical. In particular, you must acknowledge comparative alternatives and explain why you selected a particular method or structure over the alternatives illuminated by our comparative law course.

This general instruction is the most important one when it comes to grading. I need them to be as specific as possible in acknowledging the material that we covered. I make it very clear that they may choose or reject any model at their sole discretion, but their discretion must be knowingly exercised. More importantly, each student must write knowledgeably about the material, so that I may assess the pedagogical effect of the readings and of our class discussion. The students' well-crafted essays usually show me that I have largely succeeded in getting them to use foreign legal systems to understand our own in a level of detail that they had not considered before taking my course. I have had to impose strict length limitations in order to keep the essays from being too long.

D.CONCLUSION

My motivation for offering this essay at this conference is that believe that having more students and lawyers who are trained in the basics of comparative law will make international exchanges such as this one more effective. Moreover, I believe that in the United States there is a special need to have a strong, basic comparative law course that is a part of the curriculum certainly at the law school level, and perhaps even starting as an advanced undergraduate subject. Unfortunately, the biggest challenge to having such classes is course design and pedagogy generally, and having access to an appropriate textbook in particular.

My comparative law course, and hopefully my textbook on the subject reflecting the content and values that I have articulated here, can be divided into three parts. The first part covers basic comparative methodology and uses

increasingly complex case studies to provide domestically-relevant examples of their use. These chapters are also intended to capture the students' interest in and to generate enthusiasm for the course.

The second part of the course is essentially an introduction to the legal history of western Europe. Recall that Professor Merryman divided the Civil Law Tradition into a series of historical subtraditions, namely: 1) Roman civil law; 2) Canon Law; 3) Commercial Law; 4) The Revolution; and 5) Legal Science.⁷⁰ I cover those areas that I believe to be highly relevant to a new course in comparative law in my "magical history tour" part of the course. Readers will note that I eschew commercial law. The reasons for this are the "slow death" of the commercial codes in most countries, and the fact that I very purposely want my course *not* to be trade law. Therefore, I leave that subject matter for other courses.

The final part of the course covers chapters on the organization of the modern constitutional nation state and the role of law and legal structures in the functioning of a country. I also cover legal procedure and constitutionalism in this part of the course. In the two-credit variant of the class in particular, I must keep a careful focus on just a few countries and I find it most effective to use western European states for that purpose. I therefore mostly refer to France and Germany in this section. Time and book-space permitting, I would like to expand this coverage, but too much expansion is probably undesirable for the general comparative law course, and should probably be left instead to more country- or region-specific courses.

Pedagogically, the challenge for all instructors and for me as a textbook author is to be well-prepared to explain the historical context of the readings that are assigned to the students. Providing students and faculty with the resources needed to achieve this level of understanding is probably the most daunting task of the book project that I am developing. On the one hand, it will require my own expository notes of the subjects to be extensive and written in clear language designed for U.S. law students. On the other hand, writing those notes will demand that I study and summarize very extensive amounts of reading material.⁷¹ While I look forward to the task, it will be the most difficult part of the research and writing process for my comparative law textbook. More generally, the challenge for the comparative law teacher is to study the current law and legal history of multiple nations, I hope to make a contribution to simplifying these efforts.

But I must come back to the original question that motivated this essay: what is my pedagogical purpose in teaching comparative law at a law school in the United States?

I want my students to be great ambassadors of U.S. law and to bridge the cultural gap for their clients and colleagues in translational legal transactions. But

⁷⁰ See note **Error! Bookmark not defined.** *supra* and accompanying text.

⁷¹ I am seriously considering the possibility of enrolling in a doctoral program in legal history as part of this book project.

as their law school professor I am happiest using comparative examples to improve their understanding of their own legal system. The students' well-crafted essays in response to the question discussed in the previous section often show me that I have succeeded in getting many of them to use foreign legal systems to understand our own in a level of detail that they had not considered before taking my course. To be sure, understanding their own legal system makes them better able to communicate with foreign clients and counterparts, and this makes them better ambassadors of law because they are better exponents of the laws of the United States, especially for foreign clients and colleagues.

Which brings me back to the start of this essay as my contribution to the conference: if we are to engage in international legal exchanges, we must become better comparativists. I have spent the past fourteen years trying to educate better comparativists in my classroom, and I hope to continue to do so both as a teacher, as a writer, and as a contributor to these international exchanges. Thank you.

Chapter 2

THE COMPARATIVE METHOD IN UNITED STATES COURTS

This chapter includes two cases illustrating different references to comparative methodology in the courts of the United States. The opinion in the *DuPont* case, which I helped draft as a clerk in the U.S. District Court for the District of Puerto Rico, explains the way a Civil Code is supposed to be applied. A similar approach could be found in cases in Louisiana, and in other parts of the United States that retain laws with roots outside the common law tradition.

The *Eastern Airlines* case on the other hand is an example of situations in which the United States has agreed to the obligation to use foreign law when interpreting and applying an international treaty.

I have now followed the two cases with an explanatory note that explains the procedural questions posed when “foreign law” may apply in litigation before U.S. courts. This material is taken from the new 2011 edition of the *Merryman* casebook. But as the *DuPont* case indicates, we have laws in the United States that are from outside of the common law tradition and that require a specialized approach in litigation as well.

A. THE PLAZO DECENAL

1. IN RE SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION

MDL No. 721, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, 687 F. Supp. 716; 1988 U.S. Dist. LEXIS 4603

April 26, 1988, Decided

ORDER GRANTING DEFENDANTS TORO & FERRER’S MOTION TO DISMISS

INTRODUCTION

RAYMOND L. ACOSTA, United States District Judge.

Before the Court is defendants Toro & Ferrer’s motion to dismiss all claims against them as time-barred. The Plaintiffs’ Steering Committee (alternatively “PSC” or “plaintiffs”) filed an opposition to which defendants replied. Additionally, the Secretary of Justice of the Commonwealth of Puerto Rico has intervened in the matter because the Constitutionality of an Article of the Puerto

Rico Civil Code was challenged in the PSC's opposition. *See* Rule 23.1, P.R. R. Civ. P.

The parties have different interpretations of the applicable law regarding the liability of architects for their work.⁷² Defendants, architects Toro & Ferrer, argue that they are protected by the ten year statute of repose of Article 1483 of the Puerto Rico Civil Code of 1930, 31 L.P.R.A. sec. 4124 (1930). Plaintiffs counter that said period of repose does not apply to the present tort and contract case, and, alternatively, that the statute of repose violates the Equal Protection Clause because it immunizes a *class of defendants* from suit. They also attack the statute on due process grounds. In their words, the statute

arbitrarily discriminates against manufacturers, subcontractors, suppliers, retailers, materialmen and persons in actual possession or control of the improvements to real property[.]

PSC Opposition at pp. 42-43; plaintiffs add that Article 1483 violates the Due Process Clause because

[it] discriminates against *plaintiffs* who are arbitrarily deprived of the right to sue the architects and contractors, which comprise a major class of defendants.⁷³

Id. (Emphasis added.) The Secretary of Justice, while admitting that the law on the scope of Article 1483 is not entirely clear, nevertheless submits that the challenged statute does constitutionally bar plaintiffs' claims. However, he recommends certification of these issues to the Puerto Rico Supreme Court.

Given the parties' submissions, which are thoroughly discussed below, we will, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, treat defendants' motion as simply one for summary judgment. Rule 56, Fed. R. Civ. P.; *Moody v. Town of Weymouth*, 805 F.2d 30, 31 (1st Cir. 1986); *King v. Williams Industries, Inc.*, 565 F. Supp. 321, 323 (D.Mass 1983).

After careful consideration of the moving papers and the pertinent law, and upon review of the record in the light most favorable to plaintiffs, the Court finds as follows.

PROCEDURAL BACKGROUND

⁷² *See* footnote 9 *infra*.

⁷³ This statement was included in plaintiffs' equal protection argument, however, it is a perfect summary of their due process claim. *See also* footnote 30 *infra*.

1. On January 5, 1987 the first individual complaint related to this Multi-District Litigation was filed. *Pastoriza, et al. v. Hotel Systems International, etc.*, Civil No. 87-0006(RLA).⁷⁴ Toro & Ferrer were not named as defendants in that complaint.

2. On February 19, 1987 the first individual complaint in the above-captioned litigation naming Toro & Ferrer as defendants was filed. *Unternaehrer, et al. v. Hotel Systems International, etc., et al.*, Civil No. 87-0269(RLA).

3. On May 13, 1987 the Multi-District Litigation Panel ordered that, pursuant to 28 U.S.C. sec. 1407, one case related to the fire at the San Juan Dupont Plaza Hotel be transferred from the Central District of California to the District of Puerto Rico for coordinated and consolidated pretrial proceedings with all cases pending in this District before the undersigned judge. Transfer Order, filed May 26, 1987, Docket No. 142A.

4. On June 26, 1987 Toro & Ferrer filed a "Motion to Dismiss," Docket No. 171A, stating that all claims against them arising from the fire at the San Juan Dupont Plaza Hotel were time-barred by Article 1483 of the Puerto Rico Civil Code, 31 L.P.R.A. sec. 4124 (1930), which precludes suits against architects and contractors filed more than ten years after completion of the structure at issue.

5. On August 10, 1987 the PSC filed their "Opposition to Motion to Dismiss," Docket No. 224A, and "Brief in Support of Opposition to Motion to Dismiss," Docket No. 224B, arguing that Article 1483 does not apply to the plaintiffs' causes of action, and, alternatively, that said article is constitutionally defective because it denies the equal protection of the laws to a class of individuals other than plaintiffs (materialmen and others involved in the construction project) and also because application of the statute to bar their claims would constitute a denial of both substantive and procedural due process of law.

6. On August 19, 1987 Toro & Ferrer filed a "Reply to Brief in Support of Opposition to Motion to Dismiss," Docket No. 235B, challenging the plaintiffs' interpretation of Article 1483 and stating that a First Circuit case, *Cournoyer v. Massachusetts Bay Trans. Auth.*, 744 F.2d 208 (1st Cir. 1984), left no doubt that the statute was constitutional.

7. On September 15, 1987 Toro & Ferrer were named as defendants in Section AA, paragraphs AA.1 through AA.8, at pages 49 through 50 of the "Master Complaint Supplementing and Amending Individual Complaints Previously Filed," Docket No. 264.

⁷⁴ The present litigation involves cases arising out of the New Year's Eve 1986 fire at the San Juan Dupont Plaza Hotel, which killed ninety-seven (97) people and injured over one hundred (100). See footnote 4 *infra*.

8. On October 29, 1987 the Secretary of Justice filed a document entitled “Response to [the] Constitutional Attack on the Civil Code and Request for Certification to the Supreme Court of Puerto Rico,” Docket No. 476A, and supporting memorandum of law, Docket No. 476B, stating that it is clear from civil code authorities that Article 1483 applies to bar plaintiffs’ causes of action but nonetheless recommending certification of the issue to the Puerto Rico Supreme Court because there is no clear precedent from that court on this matter. Additionally, the Secretary cited *Cournoyer, supra*, to defend the constitutionality of Article 1483.

9. On December 3, 1987 Toro & Ferrer were also named as defendants in section AA, paragraphs AA.1 to AA.8, at pages 64 and 65 of the “Revised Master Complaint Supplementing and Amending Individual Complaints Previously Filed,” Docket No. 736.

10. On January 28, 1988 Toro & Ferrer filed a “Request for certification to the Supreme Court of Puerto Rico,” Docket No. 1076, thus joining the Secretary of Justice in asking for such certification.

FACTUAL BACKGROUND⁷⁵

1. Osvaldo L. Toro and Miguel Ferrer have been licensed architects in Puerto Rico since 1939.

2. Osvaldo L. Toro and Miguel Ferrer practiced their profession as partners under the name of “Toro & Ferrer, Arquitectos” (“Toro & Ferrer”).⁷⁶

⁷⁵ These facts were stated in the joint affidavit of Osvaldo L. Toro and Miguel Ferrer attached to their motion to dismiss. In their opposition, plaintiffs did not challenge any of the facts set forth in the affidavit, rather, they attacked defendants’ denial of liability by including a long description of what they allege occurred at the hotel at the time of the fire. PSC Opposition at pp. 2-15. Still, the facts in the affidavit remain uncontroverted.

⁷⁶ The PSC describes Toro & Ferrer as a corporation in paragraph AA.1 of the Amended Master Complaint. However, this appears to be a misnomer because Osvaldo L. Toro and Miguel Ferrer as architects could not practice their profession through a corporation. *Rasa Eng. Corp. v. Daubon*, 86 D.P.R. 193, 196-97 (1962)(Corporations may not practice professions such as architecture or engineering, only individuals who are properly admitted to such professions may do so.); *see also* Op. Sec. Just. No. 8 (1980). However, architects may practice through a professional partnership, *see* Civil Code Article 1569, 31 L.P.R.A. sec. 4324 (1930); *Asociacion de Propietarios v. Santa Barbara Co.*, 112 D.P.R. 33, 43, 12 P.R. S. Ct. Off. Trans. 41, 53 (1982), which is apparently what Osvaldo L. Toro and Miguel Ferrer did. Nevertheless, the individual partners would be personally liable if the suit against them were to prosper. Civil Code Articles 1588 and 1589, 31 L.P.R.A. secs. 4371 and 4372 (1930); *Asociacion de Propietarios, supra*, 112 D.P.R. at 49 (Members of a professional partnership are personally jointly and severally liable for the debts, including those in tort, incurred by the partnership which exceed the partnership’s assets). Therefore, this motion to dismiss applies to the partnership itself and to Osvaldo L. Toro and Miguel Ferrer in their personal capacity. References to the partners or to the partnership will be used interchangeably.

3. The professional partnership lasted from December 1945 to June 1986.⁷⁷
4. Some time between 1958 and 1959, a group of investors formed Enterprise Hotel Development Corporation (“Enterprise”) for the purpose of building a large ocean-front tourist hotel off Ashford Avenue in the Condado area of Santurce, Puerto Rico.
5. Enterprise entered into a hotel management contract with the Sheraton Corporation.
6. At about this time, Toro & Ferrer were retained to prepare preliminary designs and drawings for the building now known as the San Juan Dupont Plaza Hotel (“the hotel”).
7. Toro & Ferrer, with the assistance of Warner Burns Toan Lunde (a New York City architectural firm) prepared the designs and drawings for the first phase of construction (the hotel’s foundations) in March of 1961.
8. Construction of the foundations was completed four (4) months later, in July of 1961.
9. Toro & Ferrer prepared the designs and drawings for the second phase of construction (the hotel’s building structure) in October of 1961.
10. After the foundation plans were approved by Enterprise and by the concerned local and federal agencies, and after competitive bidding, the general construction contract was awarded to R.P. Farnsworth Co.
11. As architects of record, Toro & Ferrer were contractually obliged to supervise the construction of the hotel to ensure that the work conformed to the provisions of their design plans.
12. Passalacqua y Compania was employed by Enterprise as Project Manager to provide full time supervision inspection of the construction work.
13. Construction of the hotel building was finished in September of 1963.
14. Upon request by Enterprise Development, Osvaldo L. Toro prepared a “Certificate of Construction Completion and Construction Costs” on October 3, 1963.
15. The hotel started operations under the name of Puerto Rico Sheraton on October 4, 1963.
16. Between the period immediately after the hotel started operations (October 4, 1963) and 1965, Toro & Ferrer provided architectural services to the hotel’s operator (Sheraton). The work involved design changes to meet previously

⁷⁷ Although they still perform some uncompensated architectural work, Osvaldo L. Toro and Miguel Ferrer, who are both 72 years old, are now retired.

unforeseen operational needs which, though desirable, were not essential for operation of the hotel.

17. Toro & Ferrer had no professional relationship with the hotel after 1965.

18. On December 31, 1986, the fire that gave rise to this litigation severely damaged the San Juan Dupont Plaza Hotel killing ninety-seven (97) persons and injuring over one-hundred (100).

DISCUSSION

A. THE SUMMARY JUDGMENT STANDARD

Toro & Ferrer's motion must be treated as one for summary judgment under the Federal Rules of Civil Procedure. Specifically, Rule 12(b) states:

* * * If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, * * *

Submitted with Toro & Ferrer's Motion to Dismiss was the joint affidavit of Osvaldo L. Toro and Miguel Ferrer. Plaintiffs' opposition included their detailed version of what happened at the Dupont Plaza Hotel on the afternoon of December 31, 1986. Plaintiffs did not contest the factual statements in the architects' affidavit (they do, of course, contest their denial of liability). Both parties have thus availed themselves of the opportunity to address the facts. Therefore, we treat the instant motion as one for summary judgment pursuant to Fed. R. Civ. P. Rule 56(b) (defending party moving for summary judgment). *See Moody, supra*, 805 F.2d 30; *King, supra*, 565 F. Supp. at 322-323.

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2552-2553, 91 L. Ed. 2d 265 (1986), the Supreme Court of the United States held that:

* * * the plain language of Rule 56(c) [Fed. R. Civ. P.] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial * * *.

See also U.S. Fire Insurance Co. v. Productions Padosa, Inc., 835 F.2d 950 (1st Cir. 1987). Additionally, “the purpose of summary judgment is not to explore all the factual ramifications of the case, but to determine whether such exploration is necessary,” *Briggs v. Kerrigan*, 431 F.2d 967, 968 (1st Cir. 1970); therefore, the party opposing summary judgment “may not rest upon mere allegations or denials of his pleading, but his response * * * must set forth specific facts showing that there is an issue for trial.” Rule 56(e), Fed. R. Civ. P.; *Over the Road Drivers, Inc. v. Transport Ins. Co.*, 637 F.2d 816 (1st Cir. 1980).

The disaster at the San Juan Dupont Plaza Hotel occurred on December 31, 1986 the first individual lawsuit and both master complaints in this litigation were filed in 1987, more than 23 years after the hotel started to operate and 21 years after Toro & Ferrer ended all professional ties to the hotel. Defendants argue that the ten year period of Article 1483 lapsed in October of 1973 (ten years after the hotel began to operate). Plaintiffs, while arguing that Article 1483 does not apply to this case at all, nevertheless submit the alternative view that, if it applied, the ten-year period lapsed in 1975 (ten years after all professional relations between Toro & Ferrer and the hotel ended). PSC Opposition at 70.

Rule 56(c) requires that there be no *genuine* issue of *material* fact before summary judgment may be granted. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Whether the ten year period ended in 1973 or in 1975 is not a material fact, since plaintiffs’ claims were filed in 1987. Thus, even when we view the record in the light most favorable to plaintiffs, *see Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962), and accept their time frames, plaintiffs’ claims still came 12 years after the ten year period expired.⁷⁸

B. THE ISSUE

The only material issue for our consideration is whether or not Article 1483 bars plaintiffs’ claims. If it does, then defendants are entitled to judgment in their favor as a matter of law. As a threshold matter, however, we must determine the propriety of the Secretary’s and defendants’ certification requests.

⁷⁸ We would note, however, that the period probably expired at least on October 4, 1973 (10 years after the hotel began to operate). The hotel building must have been completed when it began operations, and the article clearly states that the ten years begin to run when the building is completed. 31 L.P.R.A. sec. 4124. However, it may be possible for the architects to be liable for additions and modifications made to the building between 1963 and 1965 because these occurred *after* the building was completed. *Cf. Acevedo Hernandez v. CRUV*, 110 P.R. Dec. 655 (1981). Nevertheless, further analysis of this question would serve no practical purpose because plaintiffs concede that the ten year period as to *any* work done by Toro & Ferrer for the hotel ended in 1975.

C. CERTIFICATION TO THE PUERTO RICO SUPREME COURT

1. Certification Requirements

The Secretary of Justice has moved us to certify to the Puerto Rico Supreme Court the questions about Article 1483 raised herein. Defendants have also moved for certification. These requests are grounded on the assertion that there is no binding precedent of Puerto Rico law stating that the *plazo decenal* (ten year period) of Article 1483 of the Puerto Civil Code, 31 L.P.R.A. sec. 4124 (1930), protects architects against actions by “third parties,” i.e., those not in privity of contract with the architects.

The Supreme Court of Puerto Rico has established the following prerequisites for accepting certified questions of Puerto Rico law from this court:

(1) questions of Puerto Rican law [must] be involved; (2) said questions may determine * * * the outcome of the case; (3) there are no clear precedents in the case law of the Puerto Rico Supreme Court; (4) an account of all the facts relevant to said questions be included, clearly showing the nature of the controversy in which the questions arise.

Pan Ame. Comp. Corp. v. Data Gen. Corp., 112 D.P.R. 780, 788, 12 P.R. S. Ct. Off. Trans. 983, 993 (1982).

The first element is clearly met in the present case since the question presented deals substantively with several articles⁷⁹ of the Puerto Rico Civil Code (Title 31 of L.P.R.A., hereinafter “Civil Code”). Additionally, were we to rule in favor of defendants, there is no question that a decision on this matter would be dispositive of the instant complaint against them. However, the third prerequisite is not present in this case. As the discussion of the merits below will show, although there is no Puerto Rico Supreme Court opinion which fits the facts of this case perfectly, there is sufficient case law (*jurisprudencia*) from which we can infer how that court would rule on this matter.⁸⁰ Therefore, certification of questions of

⁷⁹ All civil codes are divided into “articles” not “sections.” “Titles” are likewise not used, rather the Code is divided into “parts” and “chapters.” However, when the Laws of Puerto Rico were compiled in a single collection the editor followed the American system of “Titles” and “sections.”

⁸⁰ Because our diversity jurisdiction has been invoked, we have a duty to apply local law. Rules of Decision Act, 28 U.S.C. sec. 1652 (1982) and *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938). In carrying out this duty we generally must resolve questions of local law which are dispositive of the case, see *Meredith v. Winter Haven*, 320 U.S. 228, 234, 88 L. Ed. 9, 64 S. Ct. 7 (1943), unless we determine that the abstention doctrine applies, *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). When there is no local case law directly on point, we can predict how the local courts would decide the matter if faced with a similar case. See *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 209, 100 L. Ed. 199, 76 S. Ct. 273 (1956)

the scope of articles of the Puerto Rico Civil Code herein is not necessary. *Venezia v. Miller Brewing Co.*, 626 F.2d 188, 192, n. 5 (1st Cir. 1980) (“The certification procedure was not designed so as to allow a party ‘to seek to persuade the state court to change what appears to be present law’”) *citing Cantwell v. University of Massachusetts*, 551 F.2d 879, 880 (1st Cir. 1977).

The Civil Code commentators (*tratadistas*), a very important source of Puerto Rico law, have also helped us approach the issue assuredly without need for the certification procedure.

2. *The Civil Law Legal Method*

Derecho Puertorriqueno (Puerto Rico law) is the result of the long coexistence of both the Spanish Civil Code and American common law systems. Puerto Rico’s mixed jurisdiction is one of the few still fully active in the world. Through the years of association with the United States, the common law has heavily influenced local legislation, judicial opinions and legal commentary. However, the Puerto Rico Civil Code is still the basic source of law in many areas including tort law. In fact, the Civil Code itself is the mandatory starting point in the analysis of Puerto Rico tort law. *Valle v. Ame. Inter. Ins. Co.*, 108 D.P.R. 692, 695, 8 P.R. S. Ct. Off. Trans. 735, 736 (1979) (In overruling all prior tort law cases based exclusively on common law precedent, the Supreme Court stated: “Nowadays, it seems unnecessary to reiterate that, in Puerto Rico, the law on the field of damages is governed — both in form and in substance — by the civil law system.”) *cited as controlling in Santiago v. Group Brasil, Inc.*, 830 F.2d 413, 415 (1st Cir. 1987) (Products liability case). The application of the Civil Code made mandatory by *Valle* requires courts to follow analogous civil codes and their related commentaries, and, in analyzing the law, the courts must follow the civilian⁸¹ method for determining the current state of the law. *See Gen. Office Prods. v. A. M. Capen’s Sons*, 115 P.R. Dec. 553 (1984) (Refusing to apply Louisiana court’s interpretation of civil code statute because that court had not analyzed civilian authorities, and going on to decide the matter by referring to traditional civilian sources).⁸²

("As long as there is diversity jurisdiction, 'estimates' are necessarily often all that federal courts can make in ascertaining what the state court would rule to be its law")(Frankfurter, J. concurring); *Nolan v. Transocean Air Lines*, 365 U.S.293, 5 L. Ed. 2d 571, 81 S. Ct. 555 (1961) (per curiam); *Turcotte v. Ford Motor Company*, 494 F.2d 173, 179, n. 7 (1st Cir. 1974)(District court not precluded from determining how state court *would* rule if faced with same legal question); *but cf.* Note, "Prediction by Federal Courts — A Self-Fulfilling Prophecy? *Salomey v. Jeppesen & Co.*," 17 *Conn. L. Rev.* 415, 418-423 (1985).

⁸¹ In this opinion the term "civilian" is used to refer to civil code legal systems or to persons "who are skilled or versed in the civil law." Black's Law Dictionary, 5th ed., p. 223.

⁸² The matter now before us is a perfect example of what the *Valle* court intended. The question presented is one of the applicability of a Civil Code article. The parties have extensively briefed the matter on the basis of interpretations of those articles by the Puerto Rico Supreme Court and on the

The civil law system has three sources of law: (1) written law (*ley*); (2) the work of *tratadistas* (*doctrina*); and (3) judicial opinions (*jurisprudencia*). *Tratadistas* (which literally translated means “treatise writers”) are scholars who author detailed commentaries on the Civil Code, just like those scholars who analyze the common law. However, in the civil code system, the *doctrina* is an essential tool for interpretation of the law which may even be more influential than a court decision because the civilians rely more on the *doctrina* than on the case law and traditionally have not followed the doctrine of *stare decisis*.⁸³ See, e.g., *Asociacion de Propietarios v. Santa Barbara Co.*, 112 D.P.R. 33, 49, 12 P.R. S. Ct. Off. Trans. 41, 60 (1982) (Overruling an earlier decision in large part because it espoused a minority view widely criticized by the Spanish *doctrina*, which “is the main source of [Puerto Rico’s] civil law system”). In effect the *degree* of reliance upon the doctrinal commentaries by the civilians places the *tratadistas* much higher than the “secondary” authority status of common law commentaries.⁸⁴ Therefore, although the final determination as to the application of the Civil Code is up to the Puerto Rico Supreme Court, the commentaries provide a very strong indication of how that court would rule when faced with the issue.⁸⁵

Since we have enough guidance in ascertaining the current state of applicable Puerto Rico law, certification is not needed.⁸⁶ Therefore, the motions requesting certification to the Puerto Rico Supreme Court are hereby DENIED.

tratadistas' analysis thereof. Lastly, the parties do make reference by way of comparative analysis to the statutes of repose of several American states.

⁸³ "When a lawyer in a 'civil law' country has a legal problem which is not definitely settled by statute he may be satisfied to solve it without reference to decisions, but never without the literature." Mose, *International Legal Practice*, 4 *Fordh. L. Rev.* 244, 236 (1935) cited in R. Schlesinger, *Comparative Law*, Foundation Press, p. 594, n. 7 (1980) (This book gives a more detailed analysis of the civilians' approach to legal authority at pages 594 to 602).

⁸⁴ While the emphasis on the doctrine is an essential part of civilian tradition, some commentators have suggested that there may also be a practical reason for this continued emphasis. The civil code jurisdictions, unlike the common law countries, have not developed sophisticated case reporting systems and, consequently, the civilians tend to rely more on the well-written and easily available collections by the *tratadistas* than on the poorly reported case law. In fact, the only record of many important judicial opinions in civil code countries is their discussion by *tratadistas*. See generally Schlesinger, *Comparative Law*, *supra*, at pp. 599-602.

⁸⁵ Naturally, reference to the *tratadistas* cannot be used by this District Court to overrule the clear precedent in the opinions of the Puerto Rico Supreme Court. Rather, the commentaries provide guidance to District Courts in cases such as this one where the definitive word by the Supreme Court is lacking.

⁸⁶ We also note that certification of the question of the constitutionality of the relevant Civil Code Article would probably not be accepted by the Puerto Rico high court because similar provisions of the United States and Puerto Rico Constitutions are concerned. See *Pan Ame. Comp. Corp.*, *supra*, 112 D.P.R. 780, 12 P.R. S. Ct. Off. Trans. 983, (Refusing to accept certified questions as to constitutionality of statute because both Commonwealth and federal constitutions had similar provisions and Federal District Court retained power to rule on the matter under U.S. Constitution).

D. THE PLAZO DECENAL: PUERTO RICO CIVIL CODE ART. 1483

1. Introduction

As discussed above, the basic statute on tort liability in Puerto Rico is Article 1802 of the Civil Code,⁸⁷ however, there is an article which specifically addresses liability for damages caused when a building is destroyed. This statute, Article 1807 of the Civil Code, states

The owner of a building is liable for damages which may result from the collapse of the whole or a part thereof, if it should occur through the absence of the necessary repairs.

31 L.P.R.A. sec. 5146 (1930). Architects may also be liable for such “collapse” (*ruina* in Spanish).⁸⁸ Article 1809 states:

Should the damages referred to in the two preceding sections [Articles 1807 and 1808, 31 L.P.R.A. secs. 5146, 5147] arise from defects in construction, the *third person* who suffers it may only claim damages of the *architect*, or, in a proper case, of the constructor [sic, builder or contractor],⁸⁹ *within the legal period*.

31 L.P.R.A. sec. 5147 (1930)(emphasis added).

See also Cuesnongle v. Ramos, 835 F.2d 1486 (1st Cir. 1987) (discussing the Puerto Rico Supreme Court's refusal, in *Cuesnongle v. Ramos*, D.P.R. , 87 JTS 77 (June 30, 1987), to answer certified questions of arguably parallel constitutional provisions.)

⁸⁷ In relevant part, Article 1802 reads as follows:

A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done. * * *

31 L.P.R.A. sec. 5141 (1930).

⁸⁸ *Ruina* is a very broad concept which includes: (1) the complete collapse of the structure (*ruina total*); (2) defects which endanger, though not completely destroy, the entire structure or which completely destroy an essential part of it (*ruina parcial*); and (3) defects which make the structure or an essential part of it unsuitable for its intended use (*ruina funcional*). *Maldonado Perez v. Las Vegas Dev.*, 111 P.R. Dec. 573, 574-575 (1981).

⁸⁹ Throughout this opinion we will refer to and cite from the English version of Puerto Rico laws found in *Laws of Puerto Rico Annotated* ("L.P.R.A."). However, as we are dealing with the Puerto Rico Civil Code which was originally drafted in Spanish, we are bound by the Spanish text (found in *Leyes de Puerto Rico Anotadas*, also "L.P.R.A.") wherever we find the English translation of the original Spanish text to be incorrect. *See* Civil Code Article 13, 31 L.P.R.A. sec. 13 (1930).

2. *The Issue*

The seminal question in our analysis of Article 1809 is: What is the “legal period” applicable to our case pursuant to Article 1809? It has to be either one year from the date the damage was discovered, i.e., December 31, 1987, or ten years from the date the building was finished, i.e., on or before 1975.⁹⁰ Obviously, if it is the former, then plaintiffs’ claims are viable but if it is the latter, they are barred.

3. *The Law*

Plaintiffs argue that the “discovery rule” statute of limitations (i.e., that the one year statute of limitations for tort actions starts to run from the time the damage was or should reasonably have been discovered) of Article 1868 applies. In relevant part, Article 1868 reads as follows:

The following prescribe in one year:

* * * *

2. Actions to demand civil liability for grave insults [sic, wrongs] or calumny [sic, slander], *and for obligations arising from the fault or negligence mentioned in section 5141 of this title, from the time the aggrieved person had knowledge thereof.*

31 L.P.R.A. sec. 5298 (1930) (emphasis added). In contrast, defendants argue that the “legal period” referred to in Article 1809 is the *plazo decenal* or ten year period of Civil Code Article 1483 which reads as follows:

The contractor of a building which may have been destroyed by reason of defects in the construction shall be liable for the losses and damages *if said building should collapse within ten years, to be counted from the completion of the construction; and during the same time the liability shall be incurred by the architect who may have directed the work if the collapse is due to defects in the ground or in the direction.*

If the cause [of the collapse] should be the noncompliance of the contractor with the conditions of the contract, the action for indemnity may be brought within fifteen years.

31 L.P.R.A. sec. 4124 (1930).

4. *The Rationale for the Law*

⁹⁰ *But see* footnote 7 *supra*.

The *plazo decenal* of Article 1483 is not unique to Puerto Rico or its civilian model Spain, other civil code jurisdictions have similar statutes.⁹¹ Many American States also have such laws and they are known as “statutes of repose.”⁹² There is one important difference however between the statutes of repose and civil code articles like the *plazo decenal*. The statutes of repose merely impose a time limitation to the *general* liability of architects, whereas the civil code articles are both a source of specific liability as well as a time limitation on that liability.

The *plazo decenal* imposes *heavier* liability upon the architect and contractor than it does on any other class of participants in a construction project so long as the *ruina* occurs within the ten year period.⁹³ This liability is known as *responsabilidad decenal* (literally translated, “ten year liability”). In *Geigel v. Mariani*, 85 D.P.R. 46 (1962), the Puerto Rico Supreme Court held that Article 1483 creates a presumption of negligence on the part of the architect when the building collapses within the ten year period. The architect bears the burden of rebutting that presumption of negligence. *Id.* The *Geigel* court stated that the rationale for imposing the *responsabilidad decenal* upon the architect and contractor was their professional status and the fact that they controlled the job site. Nevertheless, the responsibility is limited to a ten-year period because “of a desire for fixing the exact moment when the liability expires, thus avoiding the complaints that could arise long after completion and delivery of the job site about the specific source of the alleged damage.” *Rivera, supra*, 107 D.P.R. at 388 (translation ours). In other words, it was felt that the *responsabilidad decenal* was so harsh that some limitation on the length of exposure to it was necessary.

Because this *responsabilidad decenal* encompasses liability of an architect for construction defects under contract as well as tort law, *see Rosello Cruz v. Garcia*, 116 D.P.R. 511 (1985) (Architects sued in tort (*danos y perjuicios ex delicto*) by the owner of the structure subject to the presumption of negligence and to *responsabilidad decenal* under article 1483), the *plazo decenal* applies not only to the specific source of liability created by Article 1483 and similar laws, but also to the more general liability statutes such as Articles 1802 and 1809 of the Civil Code, 31 L.P.R.A. secs. 5141 and 5147.

5. *The Effect of the Limitations Period*

The ten year period is also a *plazo de caducidad*: it is not a prescriptive period (a statute of limitations) which constitutes an affirmative defense, rather it is a

⁹¹ Among others: France; Italy; Portugal; Switzerland; Germany; Bolivia; Brazil; Chile; Costa Rica; Morocco; and Russia. *Rivera v. Las Vegas Dev. Corp.*, 107 P.R. Dec. 384 (1978).

⁹² *Rivera, supra*, 107 D.P.R. 384. *See also Cournoyer, supra*, 744 F.2d 208, and cases cited therein.

⁹³ For example, materialmen and workmen are not bound by this type of liability. *Carreras v. Gonzalez Santos*, 111 P.R. Dec. 819, 822 (1981).

jurisdictional period, that is, the claim does not exist in the eyes of the law once the ten years have passed. A court of law has no flexibility to hear such time-barred claims.⁹⁴ In fact, this period is so strict that contracts shortening or lengthening the architect's liability period are unenforceable because they violate public policy. *Federal Ins. Co. v. Dresser Ind., Inc.*, 111 D.P.R. 96, 106-107 (1981).

Additionally, in *Rivera, supra*, 107 D.P.R. 384, the Puerto Rico Supreme Court ruled that the *plazo decenal* is a *plazo unico*, that is, a single time period within which the *ruina* must occur and a suit instituted. Otherwise, architects and contractors are not amenable to suit. However, justice Irizarry-Yunque, joined by Justice Negron-Garcia, disagreed with the majority's opinion that the ten year period was *both* for the *ruina* to occur *and* for suit to be brought. Irizarry-Yunque, favoring a stacking approach, would have ruled that while the *ruina* must occur within the ten year period, the appropriate prescriptive period (either Article 1868 or Article 1864, 31 L.P.R.A. secs. 5294, 5298 (1930)) would then start to run from the date of the *ruina*. Writing for the majority, Chief Justice Trias-Monge, while noting that most modern civil codes include a period for the *ruina* to occur, another for the injured party extrajudicially to complain of the damage, and yet another for bringing suit, concluded that the Puerto Rico Civil Code is an old and firmly established one, and that the clear wording of Article 1483 must be interpreted to be a single period both for the *ruina* to occur and for suit to be commenced. *Id.*, 107 D.P.R. at 389. Any changes, the Chief Justice noted, must be left to the legislature. *Id.*, 107 D.P.R. at 390. Thus, the architect is subject to the ten year liability only if the *ruina* occurs and suit is filed within the *plazo decenal*.

6. The Question of Law in the Present Case

The question now is: To whom is the architect liable during the pendency of the *plazo decenal*? Specifically, are third parties, such as plaintiffs here who lack a contractual relationship with the architect, nonetheless bound by the ten year rule of Article 1483? Third parties benefit from Article 1483's imposition of *responsabilidad decenal* upon the architects and are also bound by the *plazo decenal*'s time limitation thereon. That is the conclusion of the Spanish *tratadistas* regarding Article 1.591 of the Spanish Civil Code from which Puerto Rico's Article 1483 was copied.⁹⁵ As defendants pointed out in their reply brief, the

⁹⁴ As to the distinction between prescriptive periods and *plazos de caducidad*, see generally *Industrial Equip. Corp. v. Builders Ins. Co.*, 108 P.R. Dec. 290 (1979).

⁹⁵ See II-3 Puig-Brutau, *Fundamentos de Derecho Civil*, pp. 126-127 (1983)(The unanimous view of the *tratadistas* is that the *plazo decenal* is the legal period of article 1809); J. Cadarso-Palau, *La Responsabilidad Decenal de Arquitectos y Constructores*, Montecorvo, p. 333 (1976); II-2 Albaladejo, *Derecho Civil*, p. 441 (1975); 31 Scaevola, *Codigo Civil*, p. 617 (1974); 12 Manresa, *Codigo Civil Espanol*, p. 697 (1951); compare Santos-Briz, "El Contrato de Ejecucion de Obra y

difference of opinion among *tratadistas* alluded to by plaintiffs in their opposition is limited to the same disagreement between the majority and dissenting opinions in the *Rivera* case, that is, whether, on the one hand, both the *ruina* and the filing of the lawsuit must occur within the *plazo decenal* or, on the other hand, there is a ten year period for the *ruina* to occur and a one year period to file suit.⁹⁶ The dissenting view that so long as the *ruina* occurs within ten years from completion of the structure, suit may be instituted within the appropriate prescriptive period, would in any case not help plaintiffs since the *plazo decenal* had obviously expired when the December 31, 1986 tragedy at the hotel occurred.⁹⁷ Thus we are left with the majority opinion of the *tratadistas* that the *plazo decenal* is the “legal period” of Article 1809 and therefore the architects’ potential liability was extinguished as of 1975.

Moreover, we have some *express* indication from the Puerto Rico Supreme Court as to how it would rule on this question.⁹⁸ In *The Powerlite of P.R. v. C.R.U.V.*, 115 P.R. Dec. 654 (1984), the contractor sued the owner of the work site to recover damages caused by the latter’s allegedly tortious refusal to permit the contractor to finish the job. The question presented was whether or not defendant was within its rights when it prevented the contractor from finishing the job. The Puerto Rico Supreme Court stated that its “main task in [deciding] the case [was] to describe the liability of the architect for defective plans or ground defects and the duties of the contractor when this occurs.” *Id.*, 115 D.P.R. at 657 (translation ours). In order to decide the matter, the court ruled that although that case was not technically an *accion decenal* (i.e., a suit alleging *responsabilidad decenal*), the duties owed by the contractor to the defendant-owner were nonetheless defined by the *responsabilidad decenal* imposed by Article 1483. Specifically, the Court noted that a contractor has a duty under Article 1483 to refuse to build the structure when it is obvious that the ground cannot support it, and that its failure to do so entitled the owner to terminate the contract when its independent inspection showed that the work did not meet the contract standards. *Id.*, 115 D.P.R. at 658. As part of its careful interpretation of Article 1483, the court wrote

su Problematica Juridica,” *Revista de Derecho Privado*, May 1972 (Despite absence of express reference thereto, the *tiempo legal* of Article 1.909 (Puerto Rico’s 1809) is the *plazo decenal* of Article 1.591 (Puerto Rico’s 1483)) with IV Santos-Briz, *Derecho Civil*, pp. 394-97 (1973). *But see* Guaroa Velazquez, *Responsabilidad por los Defectos en las Edificaciones*, 20 *Rev. Jur. U.P.R.* 13, 32-34 (1950)(In this article, this local commentator, heavily cited in plaintiffs’ opposition, recognized that the Spanish *doctrina* favored the notion that the *plazo decenal* applied to the Spanish code’s equivalent of Puerto Rico Article 1809, but nonetheless criticized that notion and argued that the discovery rule should apply).

⁹⁶ This conflict was thoroughly discussed by the Puerto Rico court in *Rivera*, *supra*, 107 D.P.R. at 385-387.

⁹⁷ See footnote 7 *supra*, and accompanying text.

⁹⁸ See footnote 9 *supra*.

what this article means is, basically, that the architect is liable *to a third party* for *ruina* caused by defects in the ground⁹⁹ and in the supervision.

Id., 115 D.P.R. at 657 (emphasis added, translation ours). The court, however, did not tie this statement to the specific facts of the case, yet it was made part of an opinion which itself thoroughly analyzed the scope of Article 1483. Therefore, this statement, accompanied by the same court's previous interpretations of the *plazo decenal* as a single period, and the commentaries, leads us to conclude that the court meant exactly what it said, i.e., that Article 1483 bars suits by third parties when the *ruina* has occurred outside the ten year period.

We thus conclude that causes of action by third parties against architects pursuant to Article 1809 must be brought within ten years of the end of construction. That is because the "legal period" referred to in Article 1809 is the *plazo decenal* of Article 1483.

[Section on the Constitutionality of the Plazo Decenal mostly omitted].

The PSC's argument that architects and contractors are *favored* over materialmen and other participants in a construction project is incorrect. The *plazo decenal* imposes *heavier* liability upon the architect and contractor than it does on any other class of participants in a construction project so long as the *ruina* occurs within the ten years. Additionally, it is important to remember that *Geigel, supra*, 85 D.P.R. 46, establishes that Article 1483 creates a presumption of negligence on the part of the architect when the *ruina* occurs within the ten year period. One Spanish commentator has summarized the rationale for the *plazo decenal* as follows:

* * *, it must be noted that a certain margin of arbitrariness is inevitable when fixing any limitations period, be it a prescriptive period, or a jurisdictional one. This is the position of the French doctrine [French *tratadista*] Cantelaube, [for example], states that the ten year limitation on the warranty that may be demanded of architects and contractors appears to be, * * * equitable. 'A shorter warranty period,' he writes, 'would not have been long enough for all defects to become apparent [because] a period of appropriate length is required for the soundness and good working condition of the structure to be

⁹⁹ The Puerto Rico Supreme Court has explained that there is no such thing as inherently "defective ground," but rather this term is used to describe the relative capacity of the soil to support certain structures. *Rosello Cruz, supra*, 116 D.P.R. at 517 *citing* Cadarso-Palau, *La Responsabilidad Decenal, supra*, at 277.

manifest. A longer period of time would be useless [because] once ten years have gone by, the structure's defects are more often than not caused by aging of the structure or by the negligence and misuse of it by the owner.'

Cadarso-Palau, *La Responsabilidad Decenal*, *supra*, at 345 (footnote omitted, our translation). As discussed above, the rationale for imposing the *responsabilidad decenal* upon the architect and contractor was their professional status and the fact that they controlled the job site. Nevertheless, the responsibility is limited to a ten-year period because "of a desire for fixing the exact moment when the liability expires, thus avoiding the complaints that could arise long after completion and delivery of the job site about the specific source of the alleged damage." *Rivera*, 107 D.P.R. at 388 (translation ours). This reflects the general legislative policy of avoiding stale claims, but also, as we indicated above, it was felt that the *responsabilidad decenal* was so harsh that some time limitation was necessary in order to provide a clear indication of the end of the liability. This is also an incentive to architects to fully practice their profession and to be innovative in their work, which contributes to much needed housing construction in the densely populated jurisdiction that is Puerto Rico. Additionally, the legislature probably considered that the architect loses control of the job site to the owner once construction is completed and it is up to the owner to discover and repair defects once sufficient time has passed from completion of construction. It is not irrational, then, to limit this liability to a fixed period of time.

Thus, we conclude that the *estatuto decenal* neither deprives any class of persons of the equal protection of the law, nor deprives plaintiffs of the process they are constitutionally entitled to.

CONCLUSION

Because the *plazo decenal* has expired, all claims against Toro & Ferrer related to their participation in construction of the San Juan Dupont Plaza Hotel are barred by Article 1483 of the Puerto Rico Civil Code, 31 L.P.R.A. sec. 4124 (1930). Therefore, defendants Toro & Ferrer are entitled to summary judgment as a matter of law. Consequently, their Motion to Dismiss, filed June 26, 1987, Docket No. 224A, which we have treated as one for summary judgment, is hereby GRANTED.

Additionally, the motions requesting certification to the Puerto Rico Supreme Court, Docket Numbers 476A, 476B and 1076, are DENIED.

Partial judgment shall be entered accordingly.

IT IS SO ORDERED.

B. TREATY OBLIGATIONS TO USE THE COMPARATIVE METHOD

1. EASTERN AIRLINES, INC. v. FLOYD ET AL., No. 89-1598

SUPREME COURT OF THE UNITED STATES, 499 U.S. 530; 111 S. Ct. 1489; 113 L. Ed. 2d 569; 1991 U.S. LEXIS 2222; 59 U.S.L.W. 4307; 91 Cal. Daily Op. Service 2740; 91 Daily Journal DAR 4413, October 29, 1990, Argued, April 17, 1991, Decided

Marshall, J., delivered the opinion for a unanimous Court.

Article 17 of the Warsaw Convention¹⁰⁰ sets forth conditions under which an international air carrier can be held liable for injuries to passengers. This case presents the question whether Article 17 allows recovery for mental or psychic injuries unaccompanied by physical injury or physical manifestation of injury.

I

On May 5, 1983, an Eastern Airlines flight departed from Miami, bound for the Bahamas. Shortly after takeoff, one of the plane's three jet engines lost oil pressure. The flight crew shut down the failing engine and turned the plane around to return to Miami. Soon thereafter, the second and third engines failed due to loss of oil pressure. The plane began losing altitude rapidly, and the passengers were informed that the plane would be ditched in the Atlantic Ocean. Fortunately, after a period of descending flight without power, the crew managed to restart an engine and land the plane safely at Miami International Airport. 872 F. 2d 1462, 1466 (CA11 1989).

Respondents, a group of passengers on the flight, brought separate complaints against petitioner, Eastern Airlines, Inc. (Eastern), each claiming damages solely for mental distress arising out of the incident. The District Court entertained each complaint in a consolidated proceeding.¹⁰¹ Eastern conceded that the engine failure and subsequent preparations for ditching the plane amounted to an "accident" under Article 17 of the Convention but argued that Article 17 also makes physical injury a condition of liability. See *In re Eastern Airlines, Inc., Engine Failure*,

¹⁰⁰ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T. S. No. 876 (1934), note following 49 U. S. C. App. § 1502 (hereinafter Warsaw Convention or Convention).

¹⁰¹ Each complaint contained two state-law tort claims, a state-law claim for breach of contract, and a claim for recovery under the Warsaw Convention. *In re Eastern Airlines, Inc., Engine Failure, Miami Int'l Airport*, 629 F. Supp. 307, 309 (SD Fla. 1986). The District Court dismissed all claims. *Ibid.* We address only the theory of recovery claimed under the Warsaw Convention.

Miami Int'l Airport, 629 F. Supp. 307, 312 (SD Fla. 1986). Relying on another federal court's analysis of the French authentic text and negotiating history of the Convention, see *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (NM 1973), the District Court concluded that mental anguish alone is not compensable under Article 17. See 629 F. Supp., at 314.

The Court of Appeals for the Eleventh Circuit reversed, holding that the phrase "lesion corporelle" in the authentic French text of Article 17 encompasses purely emotional distress. See 872 F. 2d, at 1480. To support its conclusion, the court examined the French legal meaning of the term "lesion corporelle," the concurrent and subsequent history of the Convention, and cases interpreting Article 17. See *id.*, at 1471-1480. We granted certiorari, 496 U.S. 904 (1990), to resolve a conflict between the Eleventh Circuit's decision in this case and the New York Court of Appeals' decision in *Rosman v. Trans World Airlines, Inc.*, 34 N. Y. 2d 385, 314 N. E. 2d 848 (1974), which held that purely psychic trauma is not compensable under Article 17.¹⁰² We now hold that Article 17 does not allow recovery for purely mental injuries.

II

"When interpreting a treaty, we 'begin 'with the text of the treaty and the context in which the written words are used.'"" *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988), quoting *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 534 (1987), quoting *Air France v. Saks*, 470 U.S. 392, 397 (1985). Accord, *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989); *Maximov v. United States*, 373 U.S. 49, 53-54 (1963). "Other general rules of construction may be brought to bear on difficult or ambiguous passages." *Volkswagenwerk, supra*, at 700. Moreover, "treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Saks, supra*, at 396, quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-432 (1943). Accord, *Volkswagenwerk, supra*, at 700. We proceed to apply these methods in turn.

¹⁰² Courts of first instance also have disagreed on this issue. Compare *Borham v. Pan American World Airways*, 19 Aviation Cases 18,236 (CCH) (SDNY 1986) (purely mental injury covered); and *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971 (SDNY 1977) (same); and *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (CD Cal. 1975) (same); and *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238 (SDNY 1975) (*Husserl II*) (same); and *Palagonia v. Trans World Airlines*, 110 Misc. 2d 478, 442 N. Y. S. 2d 670 (Sup. 1978) (same) with *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (NM 1973) (excluding purely mental injury); and *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702 (SDNY 1972) (*Husserl I*), *aff'd*, 485 F. 2d 1240 (CA2 1973) (same).

A

Because the only authentic text of the Warsaw Convention is in French, the French text must guide our analysis. See *Saks, supra*, at 397-399. The text reads as follows:

“Le transporteur est responsable du dommage survenu *en cas de mort, de blessure ou de toute autre lesion corporelle* subie par un voyageur lorsque l'accident qui a cause le dommage s'est produit a bord de l'aeronef ou au cours de toutes operations d'embarquement et de debarquement.” 49 Stat. 3005 (emphasis added).

X

The American translation of this text, employed by the Senate when it ratified the Convention in 1934, reads:

“The carrier shall be liable for damage sustained *in the event of the death or wounding of a passenger or any other bodily injury* suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.” 49 Stat. 3018 (emphasis added).

Thus, under Article 17, an air carrier is liable for passenger injury only when three conditions are satisfied: (1) there has been an accident, in which (2) the passenger suffered “mort,” “blessure,” “ou . . . toute autre lesion corporelle,” and (3) the accident took place on board the aircraft or in the course of operations of embarking or disembarking. As petitioner concedes, the incident here took place on board the aircraft and was an “accident” for purposes of Article 17. See 872 F. 2d, at 1471. Moreover, respondents concede that they suffered neither “mort” nor “blessure” from the mishap.¹⁰³ Therefore, the narrow issue presented here is whether, under the proper interpretation of “lesion corporelle,” condition (2) is satisfied when a passenger has suffered only a mental or psychic injury.

We must consider the “French legal meaning” of “lesion corporelle” for guidance as to the shared expectations of the parties to the Convention because the Convention was drafted in French by continental jurists. See *Saks, supra*, at 399. Perhaps the simplest method of determining the meaning of a phrase appearing in a foreign legal text would be to consult a bilingual dictionary. Such dictionaries

¹⁰³ Courts and commentators agree that “blessure” refers only to “a particular case of physical impact,” 872 F. 2d 1462, 1472-1473 (CA11 1989), and thus does not by itself allow recovery for purely psychic harm. See also R. Mankiewicz, *The Liability Regime of the International Air Carrier 146* (1981) (hereinafter Mankiewicz). Respondents do not contend that “blessure” has any other meaning.

suggest that a proper translation of “lesion corporelle” is “bodily injury.” See, e. g., J. Jeraute, *Vocabulaire Francais-Anglais et Anglais-Francais de Termes et Locutions Juridiques* 205 (1953) (translating “bodily harm” or “bodily injury” as “lesion ou blessure corporelle”); see also *id.*, at 95 (translating the term “lesion” as “injury, damage, prejudice, wrong”); *id.*, at 41 (giving as one sense of “corporel” the English word “bodily”); 3 *Grand Larousse de la Langue Francaise* 1833 (1987) (defining “lesion” as a “modification de la structure d’un tissu vivant sous l’influence d’une cause morbide”). These translations, if correct, clearly suggest that Article 17 does *not* permit recovery for purely psychic injuries.¹⁰⁴ Although we have previously relied on such French dictionaries as a primary method for defining terms in the Warsaw Convention, see *Saks, supra*, at 400, and n. 3, we recognize that dictionary definitions may be too general for purposes of treaty interpretation. Our concerns are partly allayed when, as here, the dictionary translation accords with the wording used in the “two main translations of the 1929 Convention in English.” Mankiewicz 197. As we noted earlier, the translation used by the United States Senate when ratifying the Warsaw Convention equated “lesion corporelle” with “bodily injury.” See *supra*, at 535. The same wording appears in the translation used in the United Kingdom Carriage by Air Act of 1932. See L. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* 199, 204 (1988) (hereinafter Goldhirsch). We turn, then, to French legal materials, *Saks*, 470 U.S., at 400, to determine whether French jurists’ contemporary understanding of the term “lesion corporelle” differed from its translated meaning.

In 1929, as in the present day, lawyers trained in French civil law would rely on the following principal sources of French law: (1) legislation, (2) judicial decisions, and (3) scholarly writing. See generally 1 M. Planiol & G. Ripert, *Traite elementaire de droit civil*, pt. 1, Nos. 10, 122, 127 (12th ed. 1939) (Louisiana State Law Inst. trans. 1959); F. Geny, *Methodes d’Interpretation et Sources en Droit Prive Positif* Nos. 45-50 (2d ed. 1954) (Louisiana State Law Inst. trans. 1963); R. David, *French Law: Its Structure, Sources, and Methodology* 154 (M. Kindred trans. 1972). Our review of these materials indicates neither that “lesion corporelle” was a widely used legal term in French law nor that the term specifically encompassed psychic injuries.

¹⁰⁴ There is much agreement even among courts that believe that “lesion corporelle” does provide recovery for such injuries that, if “bodily injury” is the correct translation of “lesion corporelle,” Article 17 does not permit recovery for purely psychic injuries. See, e. g., 872 F. 2d, at 1471 (“While the use of the word *corporelle* would, if read literally, appear to imply that recovery for *dommage mentale* is unavailable, we are persuaded that this literal reading is unwarranted”); *Palagonia v. Trans World Airlines, supra*, at 482, 442 N. Y. S. 2d, at 673 (arguing that “the dictionary or literal translation of *lesion corporelle* as ‘bodily injury’ is not accurate as used in a legal document”). But see, *Husserl II, supra*, at 1250 (arguing that “bodily injury” “can . . . be construed to relate to emotional and mental injury”).

Turning first to legislation, we find no French legislative provisions in force in 1929 that contained the phrase “*lesion corporelle*.” The principal provision of the French Civil Code relating to the scope of compensable injuries appears to be Article 1382, which provides in very general terms: “*Tout fait quelconque de l’homme, qui cause a autrui un dommage, oblige celui par la faute duquel il est . . . arrive, a le reparer.*” See 2 Planiol & Ripert, *supra*, at pt. 1, No. 863 (translating Article 1382 as, “Every act whatever of man which causes damage to another obliges him by whose fault it happened to repair it”).

Turning next to cases, we likewise discover no French court decisions in or before 1929 that explain the phrase “*lesion corporelle*,” nor do the parties direct us to any. Indeed, we find no French case construing Article 17 of the Warsaw Convention to cover psychic injury. The only reports of French cases we did find that used the term “*lesion corporelle*” are relatively recent and involve physical injuries caused by automobile accidents and other incidents.¹⁰⁵ These cases tend to support the conclusion that, in French legal usage, the term “*lesion corporelle*” refers only to physical injuries. However, because they were decided well after the drafting of the Warsaw Convention, these cases do not necessarily reflect the contracting parties’ understanding of the term “*lesion corporelle*.”

Turning finally to French treatises and scholarly writing covering the period leading up to the Warsaw Convention, we find no materials (and the parties have brought none to our attention) indicating that “*lesion corporelle*” embraced psychic injury. Subsequent to the adoption of the Warsaw Convention, some scholars have argued that “*lesion corporelle*” as used in Article 17 should be interpreted to encompass such injury. See, *e. g.*, Mankiewicz 146 (arguing that “in French law the expression *lesion corporelle* covers any ‘personal’ injury whatsoever”); G. Miller, *Liability in International Air Transport* 128 (1977) (hereinafter Miller) (arguing that “a liberal interpretation of [Article 17] would be more in line with the spirit of the Convention”). These scholars draw on the fact that, by 1929, France — unlike many other countries, see *infra*, at 544-545, and n. 10 — permitted tort recovery for mental distress. See, *e.g.*, 2 Planiol & Ripert, *supra*, at pt. 1, No. 868A (citing cases awarding damages for injury to honor and for loss of affection). However, this *general* proposition of French tort law does not demonstrate that the *specific* phrase chosen by the contracting parties — “*lesion corporelle*” — covers purely psychic injury.

¹⁰⁵ In the several such cases that we found, there was no evidence that French courts would use the term “*lesion corporelle*” to describe purely psychic injuries. In one case, for example, the highest French court of ordinary jurisdiction, the Cour de Cassation, specifically distinguished “*coups et blessures volontaires*” (“intentional blows and injuries”) sustained by the plaintiff — which the court characterized as “*lesions*” — from “[les] troubles de nature nevrotique” (“neurotic disorders”) from which the plaintiff suffered as a result of a prior incident. See *Judgment of November 4, 1971*, Cour de Cassation, 1971 Bull. Civ. II 219, 220.

We find it noteworthy, moreover, that scholars who read “*lesion corporelle*” as encompassing psychic injury do not base their argument on explanations of this term in French cases or French treatises or even in the French Civil Code; rather, they chiefly rely on the principle of French tort law that any damage can “give rise to reparation when it is real and has been verified.” 2 Planiol & Ripert, *supra*, at pt. 1, No. 868. We do not dispute this principle of French law. However, we have been directed to no French case prior to 1929 that allowed recovery based on that principle for the type of mental injury claimed here — injury caused by fright or shock — absent an incident in which *someone* sustained physical injury.¹⁰⁶ Since our task is to “give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties,” *Saks, supra*, at 399, we find it unlikely that those parties’ apparent understanding of the term “*lesion corporelle*” as “bodily injury” would have been displaced by a meaning abstracted from the French law of damages. Particularly is this so when the cause of action for psychic injury that evidently was possible under French law in 1929 would not have been recognized in many other countries represented at the Warsaw Convention. See *infra*, at 544-545, and n. 10.

Nor is this conclusion altered by our examination of Article 17’s structure. In the decision below, the Court of Appeals found that the Article’s wording “suggests that the drafters did not intend to exclude any particular category of damages,” because if they had intended “to refer only to injury caused by physical impact,” they “would not have singled out and specifically referred to a particular case of physical impact such as *blesure* (‘wounding’).” 872 F. 2d, at 1472-1473 (citing Mankiewicz 146). This argument, which has much the same force as the surplusage canon of domestic statutory construction, is plausible. Cf. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Yet one might draw a contrary inference from the same language. As noted, one meaning of “*lesion*” is a change in the structure of an organ due to injury or disease. See *supra*, at 536, citing 3 Grand Larousse de la Langue Francaise 1833 (1987). If “*blesure*” refers to

¹⁰⁶ Of the two cases cited by Mankiewicz to demonstrate that French law did compensate mental injuries, one involved recovery by a stepdaughter for emotional distress resulting from the death of her stepmother and the other involved recovery for injury to honor arising from adultery. See Mankiewicz 145 (citing decisions of the highest French court in 1923 and 1857). See also 11 International Encyclopedia of Comparative Law: Torts ch. 9, § 9-39, pp. 16-17, and nn. 114-115 (A. Tunc ed. 1972) (citing, as the first personal injury cases permitting recovery for nonpecuniary damages, an 1833 French decision in which “counsel for the plaintiff took as an illustration of *dommage moral* for which recovery should be permitted the grief of a family upon the death of one of their members” and an 1881 Belgian decision in a wrongful death case). Whether the “shared expectation” of the Warsaw Convention parties was that the distress experienced by relatives of injured or dead airline passengers qualified under Article 17 as “*dommage survenu en cas de mort, [ou] de blesure . . . subie par un voyageur*” (“*damage sustained in the event of the death or wounding of a passenger*”) is a different question from whether psychic injury actually suffered by a passenger is encompassed by the term “*lesion corporelle*.”

injuries causing visible ruptures in the body (a common meaning of a “wounding”), “lesion corporelle” might well refer to a more general category of physical injuries that includes internal injuries caused, for example, by physical impact, smoke or exhaust inhalation, or oxygen deprivation. Admittedly, this inference still runs afoul of the Court of Appeals’ surplusage argument. However, because none of the other sources of French legal meaning noted above support the Court of Appeals’ construction, we are reluctant to give this argument dispositive weight.

The same structural argument offered by the Court of Appeals was advanced by one of the German delegates to the Warsaw Convention. See *Palagonia v. Trans World Airlines*, 110 Misc. 2d 478, 483, 442 N. Y. S. 2d 670, 673-674 (Sup. 1978) (quoting testimony of Otto Riese). Accordingly, the official German translation of “lesion corporelle” adopted by Austria, Germany, and Switzerland uses German terms whose closest English translation is apparently “infringement on the health.” See Mankiewicz 146. We are reluctant, however, to place much weight on an English translation of a German translation of a French text, particularly when we have been unable to find (and the parties have not cited) any German, Austrian, or Swiss cases adhering to the broad interpretation of Article 17 that the German delegate evidently espoused. In sum, neither the Warsaw Convention itself nor any of the applicable French legal sources demonstrates that “lesion corporelle” should be translated other than as “bodily injury” — a narrow meaning excluding purely mental injuries. However, because a broader interpretation of “lesion corporelle” reaching purely mental injuries is plausible, and the term is both ambiguous and difficult, see *supra*, at 535, we turn to additional aids to construction.¹⁰⁷

B

Translating “lesion corporelle” as “bodily injury” is consistent, we think, with the negotiating history of the Convention. “The treaty that became the Warsaw Convention was first drafted at an international conference in Paris in 1925.” *Air France v. Saks*, 470 U.S., at 401; see also *Chan v. Korean Air Lines, Ltd.*, 490 U.S., at 139 (Brennan, J., concurring in judgment). See generally [1925 Paris] Conference Internationale de Droit Prive Aerien (1936) (hereinafter Paris Conference). The final protocol of the Paris Conference contained an article specifying that: “The carrier is liable for accidents, losses, breakdowns, and delays. It is not liable if it can prove that it has taken reasonable measures designed to pre-empt damage. . . .” *Saks, supra*, at 401, translating Article 5 of the protocol, Paris Conference 87. It appears that “this expansive provision, broadly holding carriers liable in the event of an accident, would almost certainly have permitted

¹⁰⁷ We will refer to these alternative interpretations of “lesion corporelle” as the “narrow” and “broad” readings of the term.

recovery for all types of injuries, including emotional distress.” Sisk, *Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for the French Legal Meaning of *Lesion Corporelle**, 25 *Texas Int’l L. J.* 127, 142 (1990), citing Miller 124.

The Paris Conference appointed a committee of experts, the Comité International Technique d’Experts Juridiques Aériens (CITEJA), to revise its final protocol for presentation to the Warsaw Conference. See *Chan, supra*, at 139 (Brennan, J., concurring in judgment); *Saks, supra*, at 401. The CITEJA draft split the liability article of the Paris Conference’s protocol into three provisions with one addressing damages for injury to passengers, the second addressing injury to goods, and the third addressing losses caused by delay. The CITEJA subsection on injury to passengers introduced the phrase “en cas de mort, de blessure ou de toute autre lésion corporelle.” [Deuxième] Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929 (Article 21, subsection (a) of the CITEJA draft). This language was retained in Article 17 ultimately adopted by the Warsaw Conference. See 49 Stat. 3005. Although there is no definitive evidence explaining why the CITEJA drafters chose this narrower language, we believe it is reasonable to infer that the Conference adopted the narrower language to limit the types of recoverable injuries. Cf. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S., at 700-701 (noting significance of change in negotiating history of Hague Service Convention from less precise term in draft to more precise term in final treaty provision).¹⁰⁸

Our review of the documentary record for the Warsaw Conference confirms — and courts and commentators appear universally to agree — that there is no

¹⁰⁸ Courts and commentators, including the Court of Appeals, have cited the doctoral thesis of a French scholar, Yvonne Blanc-Dannery, as extrinsic evidence of the Warsaw parties’ intent. See, e.g., 872 F. 2d, at 1472; *Palagonia*, 110 Misc. 2d, at 482, 442 N. Y. S. 2d, at 673; Mankiewicz 146. According to Mankiewicz, the Blanc-Dannery thesis was written under the supervision of Georges Ripert. Mankiewicz 146, citing Blanc-Dannery, *La Convention de Varsovie et les Règles du Transport Aérien International* (1933) (hereinafter *Blanc-Dannery*). Georges Ripert was a leading French delegate at the Warsaw Convention and an expert of the French Government at the CITEJA proceedings. Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw 6 (R. Horner & D. Legrez trans. 1975) (hereinafter *Minutes*). Mankiewicz translates a passage from the Blanc-Dannery thesis as follows: “The use of the expression *lésion* after the words ‘death’ and ‘wounding’ encompasses and contemplates cases of traumatism and nervous troubles, the consequences of which do not immediately become manifest in the organism but which can be related to the accident.” Mankiewicz 146. Eastern offers persuasive evidence that Mankiewicz’s translation may be overbroad. See Reply Brief for Petitioner 2 (noting that the French word “perturbations” should be translated to connote a disturbance or aberration in a bodily organ or function rather than mere traumatisms or nervous troubles). Even if Mankiewicz’s translation is accurate, however, Blanc-Dannery’s asserted definition is not supported by evidence from the CITEJA or Warsaw proceedings. See *Blanc-Dannery* 62. In the absence of such support we find the Blanc-Dannery thesis to have little or no value as evidence of the drafters’ intent.

evidence that the drafters or signatories of the Warsaw Convention specifically considered liability for psychic injury or the meaning of “*lesion corporelle*.” See generally Minutes. Two explanations commonly are offered for why the subject of mental injuries never arose during the Convention proceedings: (1) many jurisdictions did not recognize recovery for mental injury at that time, or (2) the drafters simply could not contemplate a psychic injury unaccompanied by a physical injury. See, e. g., *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238, 1249 (SDNY 1975) (*Husserl II*); *Cie Air France v. Teichner*, 39 Revue Francaise de Droit Aerien 232, 242, 23 Eur. Tr. L. 87, 101 (Israel 1984); Mankiewicz 144-145; Miller 123-125. Indeed, the unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference¹⁰⁹ persuades us that the signatories had no specific intent to include such a remedy in the Convention. Because such a remedy was unknown in many, if not most, jurisdictions in 1929, the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury if they had specifically intended to allow such recovery.

In this sense, we find it significant that, when the parties to a different international transport treaty wanted to make it clear that rail passengers could recover for purely psychic harms, the drafters made a specific modification to this effect. The liability provision of the Berne Convention on International Rail, drafted in 1952, originally conditioned liability on “*la mort, les blessures et toute autre atteinte, a l’integrite corporelle*.” International Convention Concerning the Carriage of Passengers and Luggage By Rail, Berne, Oct. 25, 1952, 242 U. N. T. S. 355, Article 28, p. 390. The drafters subsequently modified this provision to

¹⁰⁹ Although French law recognized recovery for certain types of mental distress long before the Convention was drafted, see Mankiewicz 145, in common-law jurisdictions mental distress generally was excluded from recovery in 1929. See Miller 113. Such recovery was not definitively recognized in the United Kingdom until the early 1940’s. See Mankiewicz 145; J. Fleming, *Law of Torts* 49 (1985) (hereinafter Fleming). American courts insisted on a physical impact rule long after English courts abandoned the practice. See *ibid.*; W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 54, p. 363 (5th ed. 1984). In the State of New York, where many Warsaw Convention cases have been litigated, recovery for purely mental injury was not recognized until 1961. See Mankiewicz 145, citing *Battalla v. State*, 10 N. Y. 2d 237, 176 N. E. 2d 729 (1961); see also Miller 113-115 (noting the post-1929 liberalization of rules for tort recovery in the United Kingdom and the United States). Several of the civil law and socialist signatories to the Warsaw Convention were slow to recognize recovery for non-pecuniary losses such as pain and suffering, grief caused by the death of a relative, or mental distress. See 11 *International Encyclopedia of Comparative Law: Torts*, Ch. 9, § § 9-39, 9-40. The Netherlands, for example, did not permit nonpecuniary damages until 1943, and the German and Swiss Civil Codes generally barred nonpecuniary damages, though with certain exceptions — including an exception for cases of personal injury. See *id.*, at § 9-41. In addition, the Soviet Union, another original signatory, has never recognized compensation for nonpecuniary loss. *Id.*, at § 9-37. In countries barring recovery for non-pecuniary losses, recovery for mental injuries might have been available where financial loss could be shown, however, we are not aware of any such cases.

read “l’integrite physique *ou mentale*.” See Additional Convention to the International Convention Concerning the Carriage of Passengers and Luggage by Rail (CIV) of Feb. 25, 1961, Relating to the Liability of the Railway for Death of and Personal Injury to Passengers, done Feb. 26, 1966, Art. 2, reprinted in *Transport: International Transport Treaties V-52* (Kluwer Publishers) (Supp. 1-10, Jan. 1986) (emphasis added).

The narrower reading of “lesion corporelle” also is consistent with the primary purpose of the contracting parties to the Convention: limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry. See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 256 (1984); Minutes 37; Lowenfeld & Mendelsohn, *The United States and The Warsaw Convention*, 80 Harv. L. Rev. 497, 498-499 (1967) (hereinafter Lowenfeld & Mendelsohn). Indeed, it was for this reason that the Warsaw delegates imposed a maximum recovery of \$ 8,300 for an accident — a low amount even by 1929 standards. See Lowenfeld & Mendelsohn 498-499.¹¹⁰ Whatever may be the current view among Convention signatories, in 1929 the parties were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers, and we read “lesion corporelle” in a way that respects that legislative choice.

C

We also conclude that, on balance, the evidence of the post-1929 “conduct” and “interpretations of the signatories,” *Saks*, 470 U.S., at 403, supports the narrow translation of “lesion corporelle.”

In the years following adoption of the Convention, some scholars questioned whether Article 17 extended to mental or emotional injury. See, *e. g.*, Beaumont, *Need for Revision and Amplification of the Warsaw Convention*, 16 J. Air L. & Com. 395, 402 (1949); R. Coquoz, *Le Droit Prive International Aerien* 122 (1938); Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. Air. L. 1, 19 (1936). In 1951, a committee composed of 20 Warsaw Convention signatories met in Madrid and adopted a proposal to substitute “affection corporelle” for “lesion corporelle” in Article 17. See *International Civil Aviation Organization Legal Committee, Minutes and Documents of the Eighth Session, Madrid, ICAO Doc. 7229-LC/133*, pp. xiii, 137 (1951). The French delegate to the committee proposed this substitution because, in his view, the word “lesion” was too narrow, in that it “presupposed a rupture in the tissue, or a dissolution of

¹¹⁰ The second goal of the Convention was to establish uniform rules governing documentation such as airline tickets and waybills and uniform procedure for addressing claims arising out of international transportation. See Minutes 85, 87; Lowenfeld & Mendelsohn 499. Our construction of “lesion corporelle” also is consistent with that goal. See *infra*, at 552.

continuity” which might not cover an injury such as mental illness or lung congestion caused by a breakdown in the heating apparatus of the aircraft. See *id.*, at 136. The United States delegate opposed this change if it “implied the inclusion of mental injury or emotional disturbances or upsets which were not connected with or the result of bodily injury,” see *id.*, at 137, but the committee adopted it nonetheless, see *ibid.* Although the committee’s proposed amendment was never subsequently implemented, its discussion and vote in Madrid suggest that, in the view of the 20 signatories on the committee, “lesion corporelle” in Article 17 had a distinctly physical scope.

In finding that the signatories’ post-1929 conduct supports the broader interpretation of “lesion corporelle,” the Court of Appeals relied on three international agreements: The Hague Protocol of 1955, The Montreal Agreement of 1966, and the Guatemala City Protocol of 1971. See 872 F. 2d, at 1474-1475. For each of these agreements, the Court of Appeals emphasized that English translations rendered “lesion corporelle” as “personal injury,” instead of “bodily injury.” In our view, none of these agreements support the broad interpretation of “lesion corporelle” reached by the Court of Appeals.

The Hague Protocol amended Article 3 of the Warsaw Convention,¹¹¹ which sets forth the particular information a passenger’s ticket must contain, to require notice of the limitation upon the carrier’s liability for passenger injuries under the Convention. See Hague Protocol Article III, reprinted in Goldhirsch 266. While the authentic French version of Article 3 retained the phrase “lesion corporelle,” the authentic *English* version of the Hague Protocol, which was proposed by the United States delegation, used the phrase “personal injury.” See 2 International Civil Aviation Organization, International Conference on Private Air Law, The Hague, Sept. 1955, ICAO Doc. 7686-LC/140, p. 243 (proposal of the United States); see also Goldhirsch 266 (citing final version of Hague Protocol).¹¹² Citing *Saks*, the Court of Appeals treated the Hague Protocol’s use of “personal injury” as

¹¹¹ The Hague Protocol also amended the Convention to double the limit of liability for accidents to \$ 16,600. See Hague Protocol Article XI, reprinted in Goldhirsch 268-269; Lowenfeld & Mendelsohn 507-509. At the Hague Conference, the signatories were presented with a proposal to amend Article 17 to cover purely mental injuries. The Greek delegation proposed adding the word “mental” to Article 17 because it was “not clear” whether Article 17 allowed recovery for such injury. See 1 International Civil Aviation Organization, International Conference on Private Air Law, The Hague, Sept. 1955, ICAO Doc. 7686-LC/140, p. 261. No one seconded this proposal. *Ibid.* In the absence of further discussion by the delegates, we cannot infer much from that fact.

¹¹² According to the English text of the final version, passenger tickets must contain “a notice to the effect that, if the passenger’s journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers *for death or personal injury* and in respect of loss of or damage to baggage.” Goldhirsch 266 (emphasis added). The French version of the text emphasized above reads: “en cas de mort ou de lesion corporelle.” *Id.*, at 256.

a “subsequent interpretation of the signatories” that “helps clarify the meaning” of “lesion corporelle.” See 872 F. 2d, at 1474-1475. However, we do not accept the argument that the Hague Protocol signatories intended “personal injury” to be an interpretive translation of “lesion corporelle” where there is no evidence that they intended the authentic English text to effect a substantive change in, or clarification of that term. Moreover, the portion of Article 3 of the Hague Protocol in which “personal injury” appears is concerned solely with informing passengers that when the convention “governs” it “in most cases limits the liability of carriers for death or personal injury.” See *supra*, n. 13. It may be, therefore, that the signatories used “personal injury” not as an interpretive translation of “lesion corporelle” but merely as a way of giving a summary description of the limitations of liability imposed by the Convention.

The Montreal Agreement of 1966 is similarly inconclusive. The Agreement, which affects only international flights with connecting points in the United States, raised the limit of accident liability to \$ 75,000 and waived due-care defenses. See Montreal Agreement, reprinted in Goldhirsch 317-318; Lowenfeld & Mendelsohn 596-597. The Court of Appeals noted that, under the Montreal Agreement, the notice appearing on passenger tickets used the term “personal injury” rather than “bodily injury” and that the United States Civil Aeronautics Board used these terms interchangeably in approving the Agreement. 872 F. 2d, at 1474. For two reasons, we do not believe that this evidence bears on the signatories’ understanding of “lesion corporelle” in Article 17. First, as the Court of Appeals acknowledged, “the Montreal Agreement is not a treaty, but rather an agreement among all major international air carriers that imposes a quasi-legal and largely experimental system of liability essentially contractual in nature.” *Id.*, at 1468-1469. Therefore, the Montreal Agreement does not and cannot purport to speak for the signatories to the Warsaw Convention. Second, the Montreal Agreement does not purport to change or clarify the provisions of Article 17.

We likewise do not believe that the Guatemala City Protocol of 1971 sheds any light upon the intended scope of Article 17. The Protocol was drafted in three authentic texts, English, French, and Spanish, but the French text was to control in cases of conflict. See Guatemala City Protocol Article XXVI, reprinted in Goldhirsch 329. The Protocol amended the French text of Article 17 by deleting the word “blessure,” while retaining “lesion corporelle.” See 2 International Civil Aviation Organization, International Conference on Air Law, Guatemala City, ICAO Doc. 9040-LC/167-2, p. 183 (1972). Additionally, the English text of the Protocol substituted “personal injury” for “wounding or other bodily injury” in Article 17. See Guatemala City Protocol Article IV, reprinted in Goldhirsch 320-321. The Court of Appeals read the changes in both the French and English versions of Article 17 as supporting an interpretation of “lesion corporelle” broader than “bodily injury.” See 872 F. 2d, at 1475.

For several reasons, however, we disagree. First, there is no evidence that the changes to the English or French text were intended to effect a substantive change or clarification. Cf. Miller 123 (noting that the change to the English text was inconspicuously proposed by a drafting group of the ICAO Legal Committee as a minor drafting improvement). Neither mental injuries nor the minor drafting changes were discussed at the Guatemala City Conference. See 1 International Civil Aviation Organization, International Conference on Air Law, Minutes, Guatemala City, ICAO Doc. 9040-LC/167-1, pp. 31-38, 41-63 (1972). Second, of the approximately 120 signatories to the Warsaw Convention, only a few countries have actually ratified the Guatemala City Protocol, see Mankiewicz 237, and therefore the Protocol is not in effect in the international arena. Likewise, we have stated that because the United States Senate has not ratified the Protocol we should not consider it to be dispositive. See *Saks, supra*, at 403.

We must also consult the opinions of our sister signatories in searching for the meaning of a “lesion corporelle.” See *Saks*, 470 U.S., at 404. The only apparent judicial decision from a sister signatory addressing recovery for purely mental injuries under Article 17 is that of the Supreme Court of Israel. That court held that Article 17 does allow recovery for purely psychic injuries. See *Cie Air France v. Teichner*, 39 Revue Francaise de Droit Aerien, at 243, 23 Eur. Tr. L., at 102.¹¹³

Teichner arose from the hijacking in 1976 of an Air France flight to Entebbe, Uganda. Passengers sought compensation for psychic injuries caused by the ordeal of the hijacking and detention at the Entebbe Airport. While acknowledging that the negotiating history of the Warsaw Convention was silent as to the availability of such compensation, *id.*, at 242, 23 Eur. Tr. L., at 101, the court determined that “desirable jurisprudential policy” (“la politique jurisprudentielle souhaitable”) favored an expansive reading of Article 17 to reach purely psychic injuries. *Id.*, at 243, 23 Eur. Tr. L., at 102. In reaching this conclusion, the court emphasized the post-1929 development of the aviation industry and the evolution of Anglo-American and Israeli law to allow recovery for psychic injury in certain circumstances. *Ibid.*, 23 Eur. Tr. L., at 101-102. In addition, the court followed the view of Miller that this expansive construction was desirable to avoid an apparent conflict between the French and English versions of the Guatemala City Protocol. *Id.*, at 243-244, 23 Eur. Tr. L., at 102, citing Miller 128-129.

Although we recognize the deference owed to the Israeli court’s interpretation of Article 17, see *Saks, supra*, at 404, we are not persuaded by that court’s reasoning. Even if we were to agree that allowing recovery for purely psychic injury is desirable as a policy goal, we cannot give effect to such policy without convincing evidence that the signatories’ intent with respect to Article 17 would allow such recovery. As discussed, neither the language, negotiating history, nor

¹¹³ In the only published versions that we could find, the Israeli opinion is reported in French.

postenactment interpretations of Article 17 clearly evidences such intent. Nor does the Guatemala City Protocol support the Israeli court's conclusion because nothing in the Protocol purports to amend Article 17 to reach mental injuries. Moreover, although the Protocol reflects a liberalization of attitudes toward passenger recovery in that it provides for strict liability, see Article IV, reprinted in Goldhirsch 320, the fact that the Guatemala City Protocol is still not in effect after almost 20 years since it was drafted should caution *against* attaching significance to it.

Moreover, we believe our construction of Article 17 better accords with the Warsaw Convention's stated purpose of achieving uniformity of rules governing claims arising from international air transportation. See n. 11, *supra*. As noted, the Montreal Agreement subjects international carriers to strict liability for Article 17 injuries sustained on flights connected with the United States. See *supra*, at 549. Recovery for mental distress traditionally has been subject to a high degree of proof, both in this country and others. See Prosser and Keeton on Torts, at 60-65, 359-361 (American courts require extreme and outrageous conduct by the tortfeasor); Fleming 49-50 (British courts limit such recovery through the theory of foreseeability); Miller 114, 126 (French courts require proof of fault and proof that damage is direct and certain). We have no doubt that subjecting international air carriers to *strict* liability for purely mental distress would be controversial for most signatory countries. Our construction avoids this potential source of divergence.

III

We conclude that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury. Although Article 17 renders air carriers liable for "damage sustained in the event of" ("dommage survenu en cas de") such injuries, see 49 Stat. 3005, 3018, we express no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries. That issue is not presented here because respondents do not allege physical injury or physical manifestation of injury. See App. 3-9.

Eastern urges us to hold that the Warsaw Convention provides the exclusive cause of action for injuries sustained during international air transportation. The Court of Appeals did not address this question, and we did not grant certiorari to consider it. We therefore decline to reach it here.

The judgment of the Court of Appeals is reversed. *It is so ordered.*

C. LITIGATING CASES WITH FOREIGN PARTIES OR FOREIGN LAW ISSUES IN AMERICAN COURTS

(From Merryman, Clark & Haley, *COMPARATIVE LAW: HISTORICAL DEVELOPMENT OF THE CIVIL LAW TRADITION IN EUROPE, LATIN AMERICA AND EAST ASIA* (LEXIS-NEXIS 2010), PAGES 103-119)

1. NOTE ON TRANSNATIONAL LITIGATION

The growing importance of international commerce and travel in the past half century has had a dramatic impact on civil litigation in United States courts. Today plaintiffs (Americans or foreigners) routinely name individuals or firms from another country as defendants in lawsuits seeking to enforce product liability, labor, environmental protection, or consumer protection laws. Equally prevalent are contract and corporate law actions arising out of transnational business activities as well as antitrust or other regulatory actions against foreign businesses.

How does one subject a foreign party to the power of a U.S. court or obtain information relevant to the case from a foreign defendant or foreign nonparty witness? Foreign law may govern when an American state's choice of law rule points to the internal law of a foreign country. Examples include disputes involving contracts made or to be performed abroad, foreign property holdings, torts committed overseas, estates of foreign domiciliaries leaving assets in the U.S. or estates of Americans with real property abroad, and foreign marriages, separations, and child custody or support obligations. How should one plead and prove foreign law in an American court? How does one enforce a foreign country judgment in an American court? ***.

The increase in American lawsuits with a foreign element stimulated substantial changes in federal and state law affecting transnational litigation. On the federal level the Judicial Conference responded in 1963 with amendments to the Federal Rules of Civil Procedure. Current Rule 4(f) provides for alternative methods to serve American judicial documents abroad and Rule 28(b) governs taking depositions abroad and legitimizes use of letters rogatory in federal cases. In 1964 Congress added 28 U.S.C. § 1696 and §§ 1781-1782 to improve judicial procedure for serving foreign documents in the U.S. and for obtaining evidence on behalf of foreign and international tribunals. The legislative sponsors hoped that such liberal provision of nonreciprocal national rules might induce other countries to cooperate and follow the U.S. example. Lastly, in 1966 the addition of Rule 44.1 to the Federal Rules of Civil Procedure and Rule 26.1 to the Federal Rules of Criminal Procedure facilitated the notice and proof of foreign law in federal courts.

Meanwhile, in 1963 the United States had joined the Hague Conference on Private International Law and the International Institute for the Unification of Private Law (UNIDROIT) in Rome, which marked its willingness to enter into treaties related to international civil procedure. Three such worldwide agreements are now in effect for the United States: the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (1969); the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1970); and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (1972).

These developments increased the involvement of the United States executive branch in facilitating transnational litigation. For instance, since the Hague Service Convention requires that each signatory designate a Central Authority through which service might be made, the Department of Justice Civil Division assumed the position of a central office for routine international cooperation in judicial procedure with its Office of International Judicial Assistance. Furthermore, the Department of State established the position of Assistant Legal Adviser for Private International Law, responsible, *inter alia*, for the negotiation of new treaties concerning international civil procedure.

When the predecessor to this book appeared in 1994—*The Civil Law Tradition: Europe, Latin America, and East Asia*—the field of international (or transnational) civil litigation was in its early years in the United States. Because the area was an example of applied comparative law, with foreign legal rules and institutions often compared to those in the United States, the analogous 1994 chapter treated the full litigation process of service of summons to appeal and enforcement of foreign country judgments. In 1989, Gary Born and David Westin had published the first casebook and treatise on the subject, *International Civil Litigation in United States Courts: Commentary and Materials*.¹¹⁴ Today, the topic is taught in most U.S. law schools and is an important part of a comparative and international law curriculum. Excellent treatments of the subject with a comparative focus include *COMPARATIVE LAW BEFORE THE COURTS* (Guy Canivet, Mads Andenas & Duncan Fairgrieve eds., 2004); *THE USE OF COMPARATIVE LAW BY COURTS* (Ulrich Drobnig & Sjeff van Erp eds., 1999); and *SOFIE GEEROMS, FOREIGN LAW IN CIVIL LITIGATION: A COMPARATIVE AND FUNCTIONAL ANALYSIS* (2004).

Nevertheless, transnational litigation books typically do not treat two matters that are still significant to the international practitioner who must handle a foreign law issue in a U.S. federal or state court. Those two matters, which make up the two sections in this chapter, are the pleading or judicial notice of foreign law and the process of proving foreign law.

¹¹⁴ a For the fourth edition, see GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* (4th ed. 2007).

When choice of law rules determine that a claim or a defense is governed by foreign law, the problem of pleading and proving the relevant foreign law occurs. Where statutes do not prescribe the rules governing these procedures, the common law prevails. The basic principle of the common law has been that foreign law is a fact and must be pleaded and proved as a fact. However, in contrast to the firm adherence of the English to this "fact" treatment of foreign law, although a question of fact of a peculiar kind,¹¹⁵ most American states and the federal courts have now adopted some form of judicial notice or quasi-judicial notice provision to facilitate the pleading and determination of foreign law.

Pleading or otherwise providing sufficient notice of a foreign law issue is, of course, only part of the difficulty. One must think of legal proof in terms of statutes, decisions, customs, scholarly commentaries, translations, and expert witnesses to support the necessary contentions. The competent lawyer must interview foreign law experts, study their qualifications, and integrate their knowledge into forms and elements familiar to judges in the United States. We will consider various approaches that have evolved in the United States in the judicial resolution of foreign law questions, both at trial and on appeal.

2. PLEADING OR JUDICIAL NOTICE: APPROACHES TO RECOGNITION OF FOREIGN LAW ISSUES

NOTE ON THE COMMON LAW FACT APPROACH

The common law rule that a court should handle foreign law as a fact had its beginnings in the eighteenth century. At that time, judges believed that they should treat foreign law like commercial custom, which was similarly outside their ordinary purview. Unlike domestic law, one could not reasonably presume that a judge would know the applicable foreign rule.

Some logical consequences of treating foreign law as a fact are:

(1) It must be pleaded; a complaint that fails to comply is subject to a demurrer unless a presumption of equivalence with forum law applies.

(2) Under the traditional view, questions of foreign law go to the jury.

(3) Ordinary rules of evidence apply, which frequently prevents examination of material that could provide a proper basis for the determination of foreign law.

(4) Courts cannot conduct their own investigation, but must let the parties present the facts.

(5) A judicial decision on a point of foreign law does not constitute a precedent under the doctrine of stare decisis.

¹¹⁵ b See RICHARD FENTIMAN, *FOREIGN LAW IN ENGLISH COURTS: PLEADING, PROOF, AND CHOICE OF LAW* (1998).

(6) On appeal, courts normally only consider questions of law. They will not disturb questions of fact decided in the trial court unless they are clearly erroneous.

3.1. THE FACT APPROACH IN PRACTICE

ALBERT EHRENZWEIG, FOREIGN RULES AS "SOURCES OF LAW" *in* LEGAL THOUGHT IN THE UNITED STATES OF AMERICA UNDER CONTEMPORARY PRESSURES 71, 77 (John N. Hazard & Wenceslas J. Wagner eds., 1970)

When I was still willing to engage in this less than dignified game of legal craftsmanship, I was repeatedly employed to "testify" in American courts on foreign laws, German, Austrian, French-in one case even on Egyptian law, despite my protest that I could not even read Arabic. One of the favorite occasions for such employment is litigation concerning succession to Californian estates of aliens who must prove that their country extends "reciprocity" to American citizens. So long as this was treated as a question of fact, a decision did not create a precedent and it was quite usual to relitigate the same question regarding the same country for other parties and other dates of death. Needless to say courts used for this purpose all time-honored, or should I say time-dishonored, medieval devices of the American law of evidence, including cross-examination of the expert "witness" concerning his "character." But even today, when foreign law has been widely recognized as "law," many courts continue to insist on each party producing decisions of foreign courts, however lowly, even of countries in which such decisions are declared to be inconclusive as against statutes, treatises, or learned opinions. This practice, of course, strikes lawyers of those countries as a travesty of their laws which purportedly are sought to be ascertained.

WISCONSIN STATUTES § 902.02

§ 902.02. Uniform Judicial Notice of Foreign Law Act

(1) Courts Take Notice. Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States. . . .

(5) Foreign Country. The law of a jurisdiction other than those referred to in sub. (1) shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice .

4. GRIFFIN v. MARK TRAVEL CORP. WISCONSIN COURT OF APPEALS 724 N.W.2D 900 (2006)

FINE, JUDGE.

I

David and Alma Griffin [and six others] claim that they were injured when a van in which they were riding from the Cancun, Mexico airport to their hotel crashed. They brought this action against Viajes Turquesa, which owned the van and employed the driver, and The Mark Travel Corporation, the company from which they purchased their vacation package. The vacation package included the airport-to-hotel transportation.

The summons and complaint was filed in the circuit court for Milwaukee County on January 7, 2005, and, six days later, Maria Eli Lopez Reyes, a Mexican lawyer, took authenticated copies of the summons and complaint, and ancillary Spanish-language documents, to Viajes Turquesa's corporate headquarters in Cancun and gave them to a person who identified herself as the office coordinator and assistant to Viajes Turquesa's legal agent in that office. The only issue presented by this appeal is whether Reyes was authorized under Mexican law's adoption of the Hague Convention [on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters] to serve the papers on Viajes Turquesa.

II

A. Standard of Review

This appeal requires that we apply foreign law—the law of Mexico in connection with its adoption of the Hague Convention. In Wisconsin, unlike the rule in federal courts since the promulgation of Rule 44.1 of the Federal Rules of Civil Procedure in 1966, interpretation of foreign law is a question of fact decided by the trial judge, not of law. *Milwaukee Cheese Co. v. Olafsson*, 40 Wis.2d 575, 580, 162 N.W.2d 609, 612 (1968) (The "laws of foreign countries must be pleaded and proved as any other fact," applying Wisconsin's adoption of the Uniform Judicial Notice of Foreign Law Act, [citation omitted; it makes] the interpretation of the laws of a foreign country "an issue for the court," [taking determination away from the jury]). Significantly, a court may not take judicial notice of a foreign country's law. [Citation omitted.] Thus, the issue of what the law of a foreign country requires is one of pure fact that must be proved. A trial court's findings of fact may not be set aside on appeal unless they are "clearly erroneous." [Citation omitted.] We examine the proof submitted to the trial court in this light.

B. Proof before the Trial Court

As noted, the foreign law applied by the trial court involves Mexico's adoption of the Hague Convention. As material to this appeal, Article 10 of the Hague Convention reads:

Provided the State of destination does not object, the present Convention shall not interfere with- . . .

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination. . . .

Although Mexico was not an original signatory to the Hague Convention [citation omitted], the parties agree that Mexico acceded to the convention, and the Record reveals that it did so in 1999.

Article 21 provides, as material here: "Each Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands ... where appropriate, of- (a) opposition to the use of methods of transmission pursuant to Articles 8 and 10"

....

In sum, nations not original signatories to the Hague Convention may in whole or in part adopt the convention by depositing with the Netherlands's Ministry of Foreign Affairs their "instrument of accession" and any objections to the convention they may have.

None of the parties disputes any of the provisions of the Hague Convention that are material to this appeal, except for Viajes Turquesa's contention that Reyes was not authorized by Mexico's adoption of the convention to serve plaintiffs' summons and complaint on the company in Cancun. The dispute focuses on the meaning of the "opposition" filed by Mexico with the Netherlands's Ministry of Foreign Affairs when it acceded to the Hague Convention. As we have noted, this presents a question of fact for the trial court.¹¹⁶

Plaintiffs submitted to the trial court a copy sent to them by the Netherlands's Ministry of Foreign Affairs of that ministry's Article 31 notification to treaty signatories in connection with Mexico's oppositions to aspects of the Hague Convention. In the self-described "courtesy translation," the Netherlands's ministry sets out "declarations" in Mexico's "instrument of accession" to the Hague Convention. As material here, and as revealed by the Ministry's "courtesy translation," that instrument declared:

In relation to Article 10, the United Mexican States are opposed to the direct service of documents through diplomatic or consular agents to persons in Mexican territory according to the procedures described in sub-paragraphs a), b) and c), unless the Judicial Authority exceptionally grants the simplification different from the national regulations and provided that such a procedure does not contravene public law or violate individual guarantees. The request must contain the description of formalities whose application is required to effect service of the document.

¹¹⁶ 3 Viajes Turquesa contends that interpretation of the Hague Convention should be a question of law subject to our de novo review, and relies on *State v. King*, [citation omitted], which concerned a treaty between the United States and a native-American tribe ... for the proposition that treaty interpretation is a legal issue subject to de novo appellate review. [A]s noted, the focus here is on what Mexican law provides, and that is clearly within the rule recognized by *Milwaukee Cheese* and the other authorities. Thus, we do not have to decide whether the language in *King* upon which Viajes Turquesa relies conflicts with Wisconsin Supreme Court precedent. . . .

(Emphasis added.) This is the same translation that appears on the web site of the Hague Conference on Private International Law [citation omitted] with sixty Member States. . . .

As we have seen, Article 10(c) of the Hague Convention permits service of process in signatory states by "judicial officers, officials or other competent persons." The trial court determined that the specification of "diplomatic or consular agents" in Mexico's objection did not encompass "other competent persons" in Mexico as that phrase is used in Article 10(c) of the Hague Convention. Further, Reyes submitted to the trial court an affidavit in which she asserted. . . she is "an attorney-at-law" and "alternate Notary Public"; she served the plaintiffs' summons and complaint and ancillary Spanish-language papers on Viajes Turquesa "in the City of Cancun . . . by giving them to a woman at the company's headquarters who" represented to Reyes that "she was the company's coordinator," and that she would give the documents to Viajes Turquesa's "legal agent"; [and] under the "Notary Law of the State of Quintana Roo," she was "duly authorized to perform services of notice." . . .

The plaintiffs also submitted to the trial court a statement on a web site operated by the United States Department of State indicating that in connection with the service of process in Mexico:

There is no provision in Mexican law specifically prohibiting service by agent, if enforcement of a judgment in Mexico courts is not anticipated. Personal service is accomplished by this method, wherein the Mexican attorney serves the document and executes an Affidavit of Service before a U.S. consul or vice-consul at the American Embassy or nearest consulate. [Citation omitted.]

Reyes's affidavit of service filed with the trial court in both Spanish and in an English translation attested that she served Viajes Turquesa consistent with her later-filed affidavit from which we have quoted. As we have seen, the trial court held that Reyes was an Article 10(c) "other competent person" under Mexican law, and not a "diplomatic or consular agent" within Mexico's declaration of opposition to aspects of the convention, and that, therefore, the service on Viajes Turquesa was proper.

As noted, the only issue on appeal is whether under Mexican law and Mexico's adoption of the Hague Convention, Reyes could properly serve Viajes Turquesa in Cancun. In contending that she could not, Viajes Turquesa submits a translation of what it says is Mexico's objection to Article 10(c) of the Hague Convention appearing, in the translation offered by Viajes Turquesa, in a document titled,

"Official Federal Gazette," and subtitled, "The Bulletin of the Constitutional Government of the United Mexican States," purporting to be published on "February 16, 2001."

Although it would seem that resolution of which translation is the most accurate would be a simple fact-finding exercise, such an exercise on this Record

would have been a waste of time because under the unambiguous terms of the Hague Convention, as we have already seen, a signatory state's objections to convention provisions must be filed with the Netherlands's Ministry of Foreign Affairs. There is no evidence in the Record that the purported convention objections set out in the February 16, 2001 issue of the Bulletin of the Constitutional Government of the United Mexican States, submitted to the trial court by Viajes Turquesa, were filed with the Netherlands's ministry. That is the key flaw in Viajes Turquesa's argument. The only evidence in this Record of objections filed with the Netherlands's Ministry of Foreign Affairs by Mexico in connection with its accession to the Hague Convention are those submitted by the plaintiffs.¹¹⁷ That being so, and given Reyes's affidavit and the State Department's analysis, we cannot say that the trial court's finding that Reyes was authorized by Mexican law to serve the plaintiffs' summons and complaint on Viajes Turquesa in Cancun is clearly erroneous. Thus, we affirm.

NOTE

It is increasingly unusual in the twenty-first century to find reported American state court cases relying on the common law fact approach to foreign country law. This is due to two major developments. First, with the substantial number of cases involving foreign parties or foreign law, lawyers, judges, and state legislatures are more accustomed to transnational litigation. It simply seems to make more sense to law-trained persons to treat foreign law more like "law" than like a "fact." A consequence of shifting the emphasis toward law is to give the judge more responsibility and at the same time to show more respect toward foreign country sovereigns. Second, the influence of Federal Rule 44.1, mentioned in comparison to the Wisconsin rule by the judge in Griffin, has been extensive. Besides controlling civil litigation in the federal courts, a majority of states have substantially copied it for their own court procedure.

Lawyers often make a strategic determination in deciding whether to file a dispute in state or federal court. In cases in which foreign law is a possible issue, it will typically favor one party or the other to the dispute compared to the use of domestic law. If the choice between courts is one between federal court and a state court that uses the fact approach, a plaintiff whom the foreign law favors (other factors being equal) will select federal court. (As we will see, the federal approach should make it easier to prove the foreign law.) Since most transnational litigation involves diversity jurisdiction in federal court, this option will typically be

¹¹⁷ 5. In passing and largely undeveloped arguments, Viajes Turquesa contends in essence that the trial court should not have relied on the plaintiffs' Netherlands's Ministry materials, especially the "courtesy translation" of Mexico's objections to Article 10 of the Hague Convention. Although unlike the situation under Rule 44.1 of the Federal Rules of Civil Procedure, where . . . a federal trial court may consider information that is not admissible under the rules of evidence, [citation omitted, the Wisconsin rule] limits the trial court's ascertainment of foreign law to "admissible evidence." The evidence considered by the trial court was admissible.

available. Alternatively, if domestic law favors the plaintiff, she will file in state court and hope that the defendant will not realize that foreign law is potentially applicable or will not be able to successfully plead and prove the foreign law. In the latter situation, however, timely removal to federal court is available to the defendant who is not a domiciliary of the state in which plaintiff has filed. Thus, most important transnational litigation ends up in federal court with its more liberal treatment of foreign law.

NOTES AND QUESTIONS

1. How many of the six consequences listed above for the fact approach are still valid in Wisconsin according to the court in Griffin? In what way is the title to the Wisconsin statute § 902.02 misleading?

2. The excerpt by Professor Ehrenzweig provides insight into some of the problems associated with the common law fact approach to pleading and proving foreign law. Although the parties only submitted written materials to the court in Griffin, we will see in the cases that follow how the use of expert witnesses can ease or complicate the judge's task in ascertaining foreign law. What might an expert on Mexican law have done for the defendant in Griffin at the trial court in testifying about the Mexican article 21(a) objection to service methods under the Hague Convention?

3. Griffin illustrates how what may initially appear to be an international law issue—the interpretation of the Hague Service Convention—may actually involve the interpretation of foreign law. Since the Convention (with 60 contracting states in 2010) entered into force for the United States in 1969 and for Mexico in 1999, if the matter were one of treaty interpretation, the methods of interpretation and proof would have been quite different.

5.2. TREATING FOREIGN LAW AS "LAW"

FEDERAL RULES OF CIVIL PROCEDURE RULE 44.1

Determining Foreign Law

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

ADVISORY COMMITTEE'S NOTE RULE 44.1

39 F.R.D. 69, 117-19 (1966)

Rule 44.1 is added by amendment to furnish Federal courts with a uniform and effective procedure for raising and determining an issue concerning the law of a foreign country.

To avoid unfair surprise, the first sentence of the new rule requires that a party who intends to raise an issue of foreign law shall give notice thereof. The uncertainty under Rule 8(a) about whether foreign law must be pleaded [citations omitted] is eliminated by the provision that the notice [may be by "other writing," as amended in the stylistic changes of 2007]. It may, but need not be, incorporated in the pleadings. In some situations the pertinence of foreign law is apparent from the outset; accordingly the necessary investigation of that law will have been accomplished by the party at the pleading stage, and the notice can be given conveniently in the pleadings. In other situations the pertinence of foreign law may remain doubtful until the case is further developed. A requirement that notice of foreign law be given only through the medium of the pleadings would tend in the latter instances to force the party to engage in a peculiarly burdensome type of investigation which might turn out to be unnecessary; and correspondingly the adversary would be forced into a possible wasteful investigation. The liberal provisions for amendment of the pleadings afford help if the pleadings are used as the medium of giving notice of the foreign law; but it seems best to permit a written notice to be given outside of and later than the pleadings, provided the notice is reasonable.

The new rule does not attempt to set any definite limit on the party's time for giving the notice of an issue of foreign law; in some cases the issue may not become apparent until the trial and notice then given may still be reasonable. The stage which the case has reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised, are among the factors which the court should consider in deciding a question of the reasonableness of a notice. If notice is given by one party it need not be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties.

The second sentence of the new rule describes the materials to which the court may resort in determining an issue of foreign law. . . . [T]he ordinary rules of evidence are often inapposite to the problem of determining foreign law and have in the past prevented examination of material which could have provided a proper basis for the determination. The new rule permits consideration by the court of any relevant material, including testimony, without regard to its admissibility. . . .

In further recognition of the peculiar nature of the issue of foreign law, the new rule provides that in determining this law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel.

There is no requirement that the court give formal notice to the parties of its intention to engage in its own research on an issue of foreign law which has

been raised by them, or of its intention to raise and determine independently an issue not raised by them. Ordinarily the court should inform the parties of material it has found diverging substantially from the material which they have presented; and in general the court should give the parties an opportunity to analyze and counter new points upon which it proposes to rely. [Citations omitted.] To require, however, that the court give formal notice from time to time as it proceeds with its study of the foreign law would add an element of undesirable rigidity to the procedure for determining issues of foreign law.

The new rule refrains from imposing an obligation on the court to take "judicial notice" of foreign law because this would put an extreme burden on the court in many cases; and it avoids use of the concept of "judicial notice" in any form because of the uncertain meaning of that concept as applied to foreign law. [Citation omitted.] Rather the rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties.

Under the third sentence, the court's determination of an issue of foreign law is to be treated as a ruling on a question of "law," not "fact," so that appellate review will not be narrowly confined by the "clearly erroneous" standard of Rule 52(a). [Citations omitted.]

The new rule parallels Article IV of the Uniform Interstate and International Procedure Act, approved by the Commissioners on Uniform State Laws in 1962, except that section 4.03 of Article IV states that "[t]he court, not the jury" shall determine foreign law. The new rule does not address itself to this problem, since the Rules refrain from allocating functions as between the court and the jury. See Rule 38(a). It has long been thought, however, that the jury is not the appropriate body to determine issues of foreign law. [Citations omitted.] The majority of the States have committed such issues to determination by the court. See Article 5 of the Uniform Judicial Notice of Foreign Law Act, adopted by twenty-six states [citations omitted]. And Federal courts that have considered the problem in recent years have reached the same conclusion without reliance on statute.

CALIFORNIA EVIDENCE CODE §§ 310, 311, 452-455, 459, 460

§ 310. Questions of law for court.

(b) Determination of the law of an organization of nations or of the law of a foreign nation or a public entity in a foreign nation is a question of law to be determined in the manner provided in Division 4 (commencing with Section 450).

§ 311. Procedure when foreign or sister-state law cannot be determined. If the law of an organization of nations, a foreign nation or a state other than this state, or a public entity in a foreign nation or a state other than this state, is applicable and such law cannot be determined, the court may, as the ends of justice require, either:

(a) Apply the law of this state if the court can do so consistently with the Constitution of the United States and the Constitution of this state; or

(b) Dismiss the action without prejudice or, in the case of a reviewing court, remand the case to the trial court with directions to dismiss the action without prejudice.

§ 452. Matters which may be judicially noticed. Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451.¹¹⁸ ••••

(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

§ 453. Compulsory judicial notice upon request. The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and:

(a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and

(b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

§ 454. Information that may be used in taking judicial notice.

(a) In determining the propriety of taking judicial notice of a matter, or the tenor thereof:

(1) Any source of pertinent information, including the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party.

(2) Exclusionary rules of evidence do not apply except for Section 352 [unduly time consuming, prejudicial, or confusing evidence] and the rules of privilege.

(b) Where the subject of judicial notice is the law of an organization of nations, a foreign nation, or a public entity in a foreign nation and the court resorts to the advice of persons learned in the subject matter, such advice, if not received in open court, shall be in writing.

§ 455. Opportunity to present information to court. With respect to any matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action:

(a) If the trial court has been requested to take or has taken or proposes to take judicial notice of such matter, the court shall afford each party reasonable opportunity, before the jury is instructed or before the cause is submitted for decision by the court, to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.

(b) If the trial court resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, such

¹¹⁸ a Section 451 refers to matters that must be judicially noticed.

information and its source shall be made a part of the record in the action and the court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

§ 459. Judicial notice by reviewing court.

(a) The reviewing court shall take judicial notice of (1) each matter properly noticed by the trial court and (2) each matter that the trial court was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452. The reviewing court may take judicial notice of a matter in a tenor different from that noticed by the trial court.

(b) In determining the propriety of taking judicial notice of a matter, or the tenor thereof, the reviewing court has the same power as the trial court under Section 454.

(c) When taking judicial notice under this section of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, the reviewing court shall comply with the provisions of subdivision (a) of Section 455 if the matter was not theretofore judicially noticed in the action.

(d) In determining the propriety of taking judicial notice of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, or the tenor thereof, if the reviewing court resorts to any source of information not received in open court or not included in the record of the action, including the advice of persons learned in the subject matter, the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

§ 460. Appointment of expert by court. Where the advice of persons learned in the subject matter is required in order to enable the court to take judicial notice of a matter, the court on its own motion or on motion of any party may appoint one or more such persons to provide such advice. If the court determines to appoint such a person, he shall be appointed and [reasonably] compensated

NEW YORK CIVIL PRACTICE LAW AND RULES RULES 3016, 4511

Rule 3016. Particularity in specific actions

(e) Law of foreign country. Where a cause of action or defense is based upon the law of a foreign country or its political subdivision, the substance of the foreign law relied upon shall be stated.

Rule 4511. Judicial notice of law

(b) When judicial notice may be taken without request; when it shall be taken on request. Every court may take judicial notice without request of private acts and resolutions of the [C]ongress of the United States and of the legislature of the state; ordinances and regulations of officers, agencies or governmental subdivisions of the state or of the United States; and the laws of foreign countries or their political subdivisions. Judicial notice shall be taken of

matters specified in this subdivision if a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request it. Notice shall be given in the pleadings or prior to the presentation of any evidence at the trial, but a court may require or permit other notice.

(c) Determination by court; review as matter of law. Whether a matter is judicially noticed or proof is taken, every matter specified in this section shall be determined by the judge or referee, and included in his findings or charged to the jury. Such findings or charge shall be subject to review on appeal as a finding or charge on a matter of law.

(d) Evidence to be received on matter to be judicially noticed. In considering whether a matter of law should be judicially noticed and in determining the matter of law to be judicially noticed, the court may consider any testimony, document, information or argument on the subject, whether offered by a party or discovered through its own research. Whether or not judicial notice is taken, a printed copy of a statute or other written law or a proclamation, edict, decree or ordinance by an executive contained in a book or publication, purporting to have been published by a government or commonly admitted as evidence of the existing law in the judicial tribunals of the jurisdiction where it is in force, is prima facie evidence of such law and the unwritten or common law of a jurisdiction may be proved by witnesses or printed reports of cases of the courts of the jurisdiction.

OREGON REVISED STATUTES § 40.090¹¹⁹

§ 40.090. Kinds of law. Law judicially noticed is defined as:

(6) The law of an organization of nations and of foreign nations and public entities in foreign nations.

NOTES AND QUESTIONS

1. The federal courts and most states have now adopted some form of a judicial notice provision to facilitate the determination of foreign law. One can divide the variety of state treatment into four categories. First, about half the states and the District of Columbia have a provision modeled on Rule 44.1.

California and New York enacted more elaborate statutes, which provide that a party can compel a judge to notice foreign law if she gives adverse parties sufficient notice of her request and furnishes the court with sufficient information to take judicial notice. The issues of sufficiency remain in the discretion of the judge, but these "mandatory" statutes have more bite than the "permissive" Rule 44.1. About ten states-including Florida, Michigan, and New Jersey-have one of these bifurcated permissive-mandatory judicial notice statutes.

¹¹⁹ a Also cited as Oregon Evidence Code Rule 202.

A few states have enacted simpler judicial notice statutes, such as the example from Oregon, that leave open most important questions concerning the treatment of foreign law.

Finally, probably fewer than ten states-including Illinois-remain in the common law fact camp. Most of these states have provided, however, that a foreign law issue is for the court and not for the jury to determine, and some allow proof of the foreign law issue without use of expert witnesses. Nevertheless, the basic fact approach in these states remains intact. See, e.g., *Bianchi v. Savino Del Bene International Freight Forwarders, Inc.*, 770 N.E.2d 684 (Ill. App. 2002).

See John G. Sprankling & George R. Lanyi, *Pleading and Proof of Foreign Law in American Courts*, 19 STAN. J. INT'L L. 3, 96-97 (1983) (list of the various state rules).

2. As explained in the Advisory Committee's Note to Rule 44.1, the drafters purposely avoided the use of the concept of judicial notice. What are the advantages and disadvantages to that decision? Do the California and New York laws adequately address the appropriate roles for the lawyers and judge in dealing with foreign law?

3. Review the Note on the Common Law Fact Approach, *supra* Section A.1, which lists six consequences that follow from treating foreign law as a fact. What would be the analogous six consequences from using Federal Rule 44.1? What further differences might there be from using the California, New York, or Oregon provisions?

For the interplay between Rules 3016 and 4511(b) in New York, see, e.g., *Dresdner Bank AG v. Edelmann*, 493 N.Y.S.2d 703 (Sup. Ct. 1985).

4. May a federal court under Rule 44.1 apply foreign law even if the required notice by a party is not given? If so, under what circumstances? Most federal courts have found that they are not required to apply foreign law if it has not been raised by either party. E.g., *Commercial Ins. Co. of Newark v. Pacific-Peru Construction Corp.*, 558 F.2d 948, 952 (9th Cir. 1977). In *Commercial Insurance Co.* the court refused to apply Peruvian law and assumed that the parties acquiesced in the application of the local law of the forum, citing the Restatement 2d of Conflicts § 136, comment h (1971). *Id.*

6.3. FAILURE TO PLEAD OR PROVE FOREIGN LAW

BEL-RAY CO., INC. v. CHEMRITE LTD.

United States Court of Appeals, Third Circuit 181 F.3d 435 (1999)

STAPLETON, CIRCUIT JUDGE.

. . . This rule [44.1] provides courts with broad authority to conduct their own independent research to determine foreign law but imposes no duty upon them to do so. [Citations omitted.] The parties therefore generally carry both the burden of raising the issue that foreign law may apply in an action, and the burden

of adequately proving foreign law to enable the court to apply it in a particular case. See [citation omitted]; Restatement (Second) Conflict of Laws § 136 cmt. f (1971) ("[T]he party who claims that the foreign law is different from the local law of the forum has the burden of establishing the content of the foreign law."). Where parties fail to satisfy either burden the court will ordinarily apply the forum's law. See [citations omitted]; Restatement (Second) Conflict of Laws § 136 cmt. h (1971) ("[W]here either no information, or else insufficient information, has been obtained about the foreign law, the forum will usually decide the case in accordance with its own law, except when to do so would not meet the needs of the case or would not be in the interests of justice.").

NOTE ON THE USE OF LEX FORI

The Ninth Circuit in *DP Aviation v. Smiths Industries Aerospace and Defense Systems Ltd.*, 268 F.3d 829 (9th Cir. 2001), and the Eleventh Circuit in *Mutual Service Ins. Co. v. Frit Industries, Inc.*, 358 F.3d 1312 (11th Cir. 2004), have used the same approach suggested in *Bel-Ray* when the parties fail to plead or prove foreign law. See also *infra* Section AA *Rationis Enterprises Inc. of Panama v. Hyundai Mipo Dockyard Co.* (2d Cir. 2006). Today, this local law or forum law (*lex fori*) default permits a lawsuit to continue and to be resolved under the law that the judge knows best. This approach also has been used in some "fact" states (usually by presuming that the foreign law is the same as forum law), which provides an alternative to the traditional requirement to dismiss the lawsuit since the plaintiff has failed to plead or prove an essential fact (i.e., the foreign law) of the claim.

Judges have based the decision to use local law on several justifications that they have found acceptable. First, if the foreign law is from another common law jurisdiction, such as Australia, they presume its law is the same as forum law. Second, they extend this presumption to the laws of all countries, including those within the civil law tradition. Third, judges imagine the foreign law is based on the generally recognized legal principles of civilized nations and thus local law will reflect those same principles. Fourth and today most common, judges determine that the parties have implicitly consented to or at least acquiesced in the use of forum law to resolve their dispute. Alternatively, they determine that the parties have waived use of foreign law. Parties may have many reasons for doing so, such as avoiding the expense or delay of relying on foreign law. When they are not familiar with the forum's choice of law rules, they may have no reason to avoid the foreign law but are simply unaware that it would be applicable. The *lex fori* solution has had strong support among scholars in the conflict of laws field.

Chapter 3

COMPARATIVE LAW: DEFINITION, OBJECTIVES AND METHODS

A. INTRODUCTORY NOTE

(This is from the essay that I assigned you for the first of school. I will take the appropriate section and insert it as either a chapter introduction or as an update note at the start of the pertinent topics).

As I have already stated, I emphasize to my students that I will not cover “trade law.” By this I mean that I do not cover public international law generally, nor the treaty regimes that govern trade among nation states. I also do not cover the field that is generally labeled “international business transactions” in many law school curricula. Those are subject matters of separate courses at my school. I have learned that I need to explain this to my students in order to avoid the disappointment that may result from enrolling in a course that is not quite what the student expected. Comparative law is an elective course, and the classroom dynamics and pedagogical experience are greatly improved by having students who self-select to be in the course. This should be incorporated into the book’s introduction and should be emphasized in the course description at schools with substantial Public International Law and IBT curricular offerings.

As noted in the introduction to this essay, I have always approached comparative law as Schlesinger defined it in his textbook: as method for comparison. In my first chapter, I explain my method approach to the students in order to bring their attention to what the course is all about. I then provide them with some historical background on the origins of comparative law and its objectives. The objective of any law study is of course dependent on its purpose and desired results, but the comparative method is dynamic enough to be adapted to many purposes by a thoughtful law student or practitioner. I emphasize to the students that for a law geek like myself, there is always the simple enjoyment of studying law because I find it endlessly amusing and entertaining (students generally do not seem as giddy as I was when I was a law student, so I often tell them that for me this whole exercise is fun; otherwise, they find that my light-hearted attitude is not directed to the subject-matter of the course, but at them). This is followed by an overview of multiple comparative law methodologies. This gives the students a way to structure their study of the assigned readings that we will cover, and their own research, in the manner that is best adapted to their learning style and objectives.

I finish this chapter by pointing out that my typical students spend three years studying the law of the United States and I will have two to three hours per

week in a one-semester course to teach them about the rest of the world. Something has to give, so I choose to focus on what Professor Merryman eloquently described as the Civil Law Tradition rather than the Civil Law system:

The reader will observe that the term used is “legal tradition,” not “legal system.” The purpose is to distinguish between two quite different ideas. A legal system, as that term is here used, is an operating set of legal institutions, procedures, and rules. In this sense there are one federal and fifty state legal systems in the United States¹²⁰ separate legal systems in each of the other nations, and still other distinct legal systems in such organizations as the European [Union] and the United Nations. In a world organized into sovereign states and organizations of states, there are as many legal systems as there are such states and organizations.

A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.¹²¹

I try to incorporate as many examples of particular legal phenomena as possible into my lectures, but there must be a fundamental focus for the course that the students—and I—can use to gauge their progress. For my basic comparative law course, that is the western European legal tradition, its historical evolution, current form, and modern development, most especially as seen in France, Germany and, to a lesser extent Spain.

With the methodology and course parameters thus defined, I move on to some specific methodological case studies.

B. DEFINITION

Comparative Law is not a body of rules and principles. Primarily, it is a method, a way of looking at legal problems, legal institutions, and entire legal systems. By the use of that method it becomes possible to make observations, and

¹²⁰ And several territorial legal systems in the United States Territorial Possessions. See generally, Pedro A. Malavet, *AMERICA’S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO* (2007).

¹²¹ Merryman, Clark & Haley, *supra* note 2 at 3-4.

to gain insights, which would be denied to one who limits his study to the law of a single country.

Neither the comparative method, nor the insights gained through its use, can be said to constitute a body of binding norms, i.e. of “law” in the sense in which we speak of “the law” of Torts or “the law” of Decedents’ Estates. Strictly speaking, therefore, the term Comparative Law is a misnomer. It would be more appropriate to speak of Comparison of Laws and Legal Systems. . . .¹²²

¹²² Rudolph B Schlesinger, et al., *COMPARATIVE LAW* 1 (5th ed. 1988) (footnotes and italics omitted). An updated definition appears in the newest edition of this textbook. See Ugo A. Mattei, Teemu Ruskola and Antonio Gidi, *SCHLESINGER’S COMPARATIVE LAW* 7 (7th ed. 2009).

C.ORIGINS AND OBJECTIVES

(From: *Origins, Objectives, And Methods Of Comparative Law, in Merryman, Clark & Haley, The Civil Law Tradition: Europe, Latin America, East Asia* (1994). Some footnotes omitted).

1.ORIGINS OF COMPARATIVE LAW

Rene David & John E.C. Brierley, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 1-3 (3d ed. 1985)

There have always been studies of foreign laws and recourse to comparison in legal scholarship. The comparison of laws, at least in their geographical diversity, is as old as the science of law itself. Aristotle (384-322 B.C.), in considering what form of political community would be best, studied 153 constitutions of Greek and other cities in his treatise, *Politics*; Solon (c. 640-558 B.C.), when drafting the Athenian laws, we are told, proceeded on the same basis; the decemvirs appointed in 451-450 B.C. to draw up the law of the XII Tables for Rome are also supposed to have carried out comparative law enquiries in the Greek cities. In the Middle Ages, Canon law and Roman law were compared, and in sixteenth-century England the respective merits of the Canon law and the Common law were debated. The comparison of customary laws in continental Europe was the basis of the formulation of the principles of a "common customary private law" (*droit commun coutumier* in France; *Deutsches Privatrecht* in Germany). Montesquieu (1689-1755) attempted, through comparison, to penetrate the spirit of laws and thereby establish common principles of good government.

Many historical precedents can therefore be invoked. But the development of comparative law, as a science, is rather more recent. Only in the last century was its importance recognised, its method and aims systematically studied, and the term itself *comparative law* (*droit compare*) received and established in usage.

The reasons for this late development of comparative law as an independent science are not difficult to identify. For many previous centuries, the science of law was devoted to discovering the principles of just law, that is to say law conforming to the will of God, to nature and to reason, and there was little concern for positive law or the law as it applied in fact. Local or customary law was of importance to practitioners and the legislative measures of ruling sovereigns were of interest to governments of other countries, but neither was of any real significance to those who as thinkers in the universities meditated upon and wrote about law. Positive law in either form was neglected in the universities. There the principal study, one thought more noble and more suitable to true legal training, was the search for just rules that would be applicable in all countries. This search, which was to reveal the true science of law, was best carried out in the

study not of the various national or local laws but rather in that of Roman law and Canon law, the only laws common to the whole of the civilised (*i.e.* Christian) world.

It was, then, only in the latter part of the nineteenth century that the desirability and later the necessity of comparing national European laws emerged, little by little. This development occurred after the breakdown of the notion of a *ius commune* or law of universal application, which was brought about by the nationalism engendered by the adoption of national codifications and the implantation of these national laws as the proper subject-matter of legal studies in the universities.

2.OBJECTIVES OF COMPARATIVE LAW

George Winterton, *Comparative Law Teaching*, 23 AMERICAN JOURNAL OF COMPARATIVE LAW 69, 99-106, 109, 111-12 (1975).

A. Practical Objectives of Comparative Law

1. The International Practice of Law

The American lawyer is obliged to provide an increasingly wide range of services for his client.... The course offered to the potential practitioner must keep his needs in mind.... Accordingly law schools should offer the future practitioner only a general introductory course in comparative law. The goals of such a course were clearly outlined by Professor Schlesinger whose casebook is often used for such courses:

If it were possible to state the primary objective of a comparative law course in one sentence, I would say ... that such objective is to convey to the student “that modicum of understanding” and of familiarity with concept and terminology which will make it possible for him “really to grasp an opinion of local counsel” [quoting Professor Jessup], and, I might add, to write an understandable letter asking for such opinion. In litigated cases, moreover, that modicum of understanding should enable the practitioner intelligently to choose as well as to examine and cross-examine the experts testifying as to the foreign law....

2. Assisting the International Lawyer

In many areas the international lawyer requires information on the domestic law of a number of countries and here he must call on the assistance of the comparative lawyer. Examples are occasions when regional varieties of international law must be compared, when the law of a number of countries must

be studied in the course of preparing a draft treaty and when international lawyers must assess a country's compliance with its international obligations—in which case it is necessary to study the actual practice of a legal system and not merely the “law in the books.” An excellent example of partnership between the international lawyer and the comparative lawyer to which further reference is made below is the preparation of conventions for the unification of international trade law, especially the law of international sale of goods, shipping and air transport, and international bills of exchange....

3. The International Unification or Harmonization of Law

Comparative lawyers being aware of the many similarities between different legal systems and hoping to assist the search for world cooperation and peace have long sought to use their knowledge to effect a unification of law on a worldwide basis. This movement, which Professor Gutteridge traces to King James I, was reinforced by the enormous expansion of international trade in the late nineteenth century, for international traders and governments as well as jurists could see practical advantages in uniformity of law in areas affecting international trade and intercourse. Considerable success was achieved in the form of the General Postal Convention (1894), the Berne Conventions on Copyright (1886) and Carriage of Goods by Rail (1890), and the 1881 [u]nification of the laws of the Scandinavian countries relating to negotiable instruments. The movement toward unification of laws affecting international trade and commerce has continued and the Hague Conventions on the international carriage of goods by sea, the Paris, Warsaw, and Chicago Conventions on air navigation, the Conventions on the international sale of goods, and the continuing work of UNCITRAL are evidence of the success of the unification movement in this century.

Most comparative lawyers have however come to realize that the wider goal of the international unification of all law—much in vogue at the end of the last century—is not a realistic possibility at present, although notable among the idealists who in recent years still clung to the hope that the unification of all law is feasible in the foreseeable future were such great jurists as Roscoe Pound and Hessel Yntema. The present unfeasibility of worldwide unification of law is an inevitable consequence of the emergence onto the world stage of the countries of Africa, Asia and Latin America, and the Marxist countries. In 1900 comparative lawyers could see their task as merely the unification of the common law of the British Empire and the United States with the civil law systems of the French and German Empires and systems derived from them. Unification of the common law and the civil law probably is feasible and it is likely that the entry of Britain into the EEC will see a greater harmonization of the common law and civil law systems....

A very closely related field of comparative legal research is the elucidation of the “general principles of law” which international and occasionally national courts are directed to apply. For example art. 38(1)(c) of the Statute of the

International Court of Justice directs the court to apply *inter alia* “the general principles of law recognized by civilized nations” and art. 215 of the Treaty of Rome establishing the EEC provides that the noncontractual liability of the Community is to be governed by “the general principles common to the laws of the Member States.” Although some lawyers have sought to ascertain the “general principles of law” by reasoning solely from their own legal system and not from empirical research the principles thus arrived at are not reliable and only comparative legal research, especially common core research, can ascertain principles of law which can validly be termed “general.” . . .

4. Developing Policy

The oldest and one of the most important objectives of comparative law is the framing of policy with a view to legislation and legal reform. The study of foreign laws for this purpose can trace its origins to the Greek city-states, where Lycurgus and Solon drafted laws based on foreign models, but in modern times the study of comparative law for the purpose of framing legislative policy really begins with Montesquieu [1689-1755] and was developed by that great scholar of comparative law, Sir Henry Maine [1822-1888]. In Western nations the formulation of policy is one of the most important objectives of comparative law, and there is no doubt that it is by far the most important function served by comparative law in the economically less-developed countries....

B. Sociological Objectives of Comparative Law

Comparative law, wrote Professor Max Rheinstein some years ago, is “the observational and exactitude seeking science of law in general.... It searches for ... laws in the sense in which the word is used in the ‘sciences’....” Clearly one who wishes to understand the function of law and its institutions in society must study the role of law in many societies. Hence comparative law is the method by which the legal sociologist explores the world’s legal systems with a view to establishing general principles relating to the role of law in society; it is not mere coincidence that two of the great teachers of the sociological school of jurisprudence—Roscoe Pound and Hessel Yntema—were also great comparative lawyers.

We have seen that a sociological examination of law, considering as it does the functions laws and legal institutions perform in society, is an important preliminary to the formulation of public or even private policy, for it is only when these functions are understood that policy-makers know how to use or alter them to achieve their goals. A legislator seeking to frame policy on workers’ compensation would do a very poor job if he considered the legislation *in vacuo*, merely as a body of rules; to frame policy it is clearly necessary to understand the purpose of the legislation; and a study of the position in other countries, comparing it with that in his own, will enable him to understand the function to be performed by the legislation....

C. Political [and Cultural] Objectives

1. International Understanding

One of the causes of dissension among nations and peoples is ignorance of each other; comparative lawyers have long argued that their discipline leads to the breaking down of parochialism and narrow nationalism and hence to greater international understanding and cooperation. This view which was at least partly responsible for the great upsurge in comparative law teaching in the U.S.A. after the Second World War is obviously valid; its validity is demonstrated by the work of comparative lawyers leading to the international harmonization of certain areas of the law relating to international trade....

2. Understanding a Culture

Although as observed earlier lawyers are naturally ethnocentric, making law one of the most difficult disciplines with which to study a foreign culture, no study of the culture of a society is complete without a study of the function law plays in that society. The comparative lawyer is the only person professionally qualified to undertake this study; hence comparative lawyers see as one of their tasks the study of foreign legal systems with a view to understanding the culture of those societies.

Transnational Law Practice

Roger J. Goebel, Professional Qualification And Educational Requirements For Law Practice In A Foreign Country: Bridging The Cultural Gap, 63 Tulane Law Review 443, 444-51, 453-54 (1989)

A. Bridging the Cultural Gap

The most frequent justification for the practice of transnational law is that such a practice offers better service to customary clients from an attorney's home country who prefer to rely on lawyers familiar with their methods of doing business and their specific business requirements....

This justification explains the wave of American transnational lawyers who, in the post-World War II era, followed the export of United States capital and technology initially to Europe and Latin America, then to Asia, Africa, and other parts the world....

It has frequently been said that the pragmatically trained American lawyer provides sophisticated business sense and functional adaptability in handling legal business in widely disparate parts of the world....

Sophisticated commercial legal experience and pragmatic adaptability to different legal systems have ceased to be the monopoly of American transnational lawyers, but, in recent years, have also become the mark of leading law firms in Europe and other parts of the world. European, Canadian, Australian, and Latin American lawyers can now convince their customary clients that they too have transnational legal capacities. Many foreign law firms are moving from their home

countries to provide services or to open offices in the United States or other parts of the world. The practice of transnational law is increasingly becoming a two-way street....

Another common justification offered in recent years to encourage the practice of transnational law is that such practice is an increasingly important part of the trade in services on a global basis. As the United States' position in the trade of industrial and commercial products has weakened, the nation has become concerned with the ability of American firms to generate revenue from providing services abroad.... [T]he ability of clients to call upon sophisticated legal assistance provided by experienced transnational lawyers and law firms definitely facilitates overall capital movements, foreign investment, and international trade transactions

....

Without diminishing the importance of these first two justifications, the justification that I prefer for transnational legal practice is the role of the transnational lawyer in bridging the cultural gap. By the cultural gap I mean the tremendously important, yet sometimes hidden, barriers to international business and trade that are created by differing cultural, social, political, and economic systems. I have long been accustomed to telling young lawyers and law students that, although the development of competent legal skills is always important, at least half of the role of the transnational lawyer lies in assisting the client to bridge this cultural gap.

This assistance covers a wide spectrum: helping clients (including in-house counsel and domestic outside counsel unfamiliar with foreign practice) to convert their normal legal and business methods into those that can be successfully employed in a foreign environment; conducting negotiations and general business dealings between a client and his commercial adversary in such fashion as to help both sides understand the reasons for each other's basic concerns and desires so that a successful business deal can be struck; helping a client properly manage a subsidiary or other foreign investment vehicle in the light of the customary ways of operation in a local environment; and drafting a contract in a manner that can facilitate a practical application, by both the client and the other contracting party, which is not basically disruptive of either party's cultural or social traditions....

A legal mindset based totally upon rigid adherence to one country's legal system and practices is a serious but seldom acknowledged obstacle to the successful conduct of international business. A good example is presented by the nature of the contract used for a major international transaction, such as a joint venture agreement, a license, a franchise, or a distribution agreement.

Wall Street law firms all too often pride themselves on the development of long, complex, elaborate, and highly protective contracts designed to cover all contingencies. However, it must be said that foreign businessmen frequently view these Wall Street-style agreements as cumbersome, difficult to understand and apply, excessively limiting the parties' freedom of action, and covering peculiarities produced by case law in the United States rather than the realities of the

foreign scene. On the other hand, the traditional civil-law approach common on the continent and in Latin America produces short agreements that constitute bare statements of general principles and rather vague terms and conditions. The American businessman (and many sophisticated foreign businessmen as well) find these short-form civil-law agreements dangerously imprecise and ambiguous, with inadequate coverage of the full scope of the parties' long-term relations.

The solution to this cultural conflict is obvious, and has gained acceptance in contract drafting between sophisticated lawyers on both sides of the transnational law street: an intermediate length contract that is better structured and more precise than the older civil-law form, yet avoids the undue length and complexity of the Wall Street format. Drafting such a contract requires great clarity in presenting the essential business points so they can be understood readily by both parties, using a style that can be easily translated, and weighing boilerplate clauses carefully to determine whether they can be discarded or should be adapted to local usage....

Another risk generated by the cultural gap is the failure to recognize linguistic differences in negotiation and drafting. This can cause fatal misunderstandings, thereby disrupting the making of a business deal or leading to future contract disputes.... Americans all too often chauvinistically assume that it is up to the foreign businessman or lawyer to speak English and to deal with English language instruments. This can be the source of fatal error....

In many cases, the United States-based transnational lawyer must recognize that he is not capable of properly counseling the client about many issues in a foreign legal system. He must therefore devote the time and effort to select a competent foreign law firm, or foreign branch of an American law firm, and deal cooperatively with that firm in providing the appropriate advice to the client.

3.BECAUSE IT IS ENTERTAINING?

[From note 3 in the Merryman casebook]

Consider the objectives of comparative law described by Winterton. Can the type of comparative law discussed by Goebel, Merryman, or Henderson primarily fit into one of the following categories: professional (practical), scientific, or cultural? Which category do you find the most attractive and interesting? Can you understand why other people might have different preferences?

Reflect on Ferdinand F. Stone, *The End to Be Served by Comparative Law*, 25 Tul. L. Rev. 325 (1951):

There is a story of the man who went from place to place upon the earth and wherever he went he would pick up bricks and compare them carefully one with another. His conduct excited comment. One man said, "he must be

seeking the most perfect of all bricks.” Another said, “he must be seeking to describe the qualities inherent in all bricks.” Still another of a practical turn of mind said, “he is probably seeking a brick of just the right shape and color to fit into his wall.” And still another said, “It is possible that he is not interested in the bricks as such but in their composition. Perhaps, he would set up a kiln of his own for making bricks.” Finally, a man of action, impatient with the conjecturing, said, “let us ask him and have done with the questions.” And so they approached the stranger and asked, “for what reason do you compare the bricks?” The man answered, “I have no reason other than that it pleases me to compare them.”

4. NOTES AND QUESTIONS

1. Comparative law as a method is as old as Western law itself. What caused the special emphasis on the differences among laws as a focus of comparative law in the late 19th century? Should comparative law at the end of the 20th century be more concerned with differences or similarities among laws, or with something else altogether?

2. For background on comparative law through the 19th century, see Walther Hug, *The History of Comparative Law*, 45 Harv. L. Rev. 1027 (1932); Gino Gorla & Luigi Moccia, *A Short Historical Account of Comparative Law in Europe and in Italy During Modern Times (16th to 19th Century)*, in Italian National Reports to the XIIth International Congress of Comparative Law 67 (1986); Konrad Zweigert & Hein Kötz, 1 Introduction to Comparative Law 47-62 (Tony Weir trans., 2d ed. 1987).

4. Winterton describes international unification of law activities. U.S. delegates participate in four international organizations involved in private law unification: the Hague Conference on Private International Law; the International Institute for the Unification of Private Law (UNIDROIT, Rome); the United Nations Commission on International Trade Law (UNCITRAL); and the Organization of American States with its Inter-American Specialized Conferences on Private International Law (CIDIP). Draftsmen of proposals carry out elaborate comparative studies so that legal rules can fit into the procedural and substantive law of member states.

The United States has in recent years become more willing to ratify treaties in this field. For instance, the U.N. Convention on Contracts for the International Sale of Goods (CISG) entered into force for the United States in 1988 and in 1990 it had 25 signatories. The Convention applies even if the international sales contract is not in writing. It sets out many aspects of the substantive law to govern the formation of the sales contract and the rights and obligations of the buyer and seller. That law governs if the contract is silent on applicable law, whether that silence is by inadvertence, design, or because the parties could not agree on applicable law. For an interesting look at how comparative law analysis facilitated

compromise between lawyers from the common law and civil law traditions, see Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 Int'l Law. 443 (1989).

For the increasing importance of the Hague conventions on service of process abroad and taking evidence abroad, see Chapter 2, Sections A and C [in the Merryman casebook].

For comprehensive reports on U.S. participation in private law unification, see the articles by Peter H. Pfund, assistant legal adviser for private international law, U.S. Department of State: 19 Int'l Law. 505 (1985); 20 *ibid.* 623 (1986); 21 *ibid.* 1245 (1987); 22 *ibid.* 1157 (1988). Current work by UNIDROIT is discussed in its journal, *Revue de droit uniforme/Uniform Law Review*. See generally Rene David, *The International Unification of Private Law*, in 2 Int'l Ency. Comp. L., ch. 5 (The Legal Systems of the World: Their Comparison and Unification, Rene David ed. 1971).

5. Winterton also mentions comparative law research directed toward establishing "general principles of law recognized by civilized nations." Rudolf B. Schlesinger, *The Common Core of Legal Systems: An Emerging Subject of Comparative Study*, in *XXth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E. Yntema* 65 (Kurt H. Nadelmann et al. eds. 1961) states:

Somewhat similar terms, such as "common core," "common denominators," and "the common law of mankind," have become current in scholarly discussions. These various forms of words may not be synonymous, but all of them express a basic underlying assumption that the differences between legal systems, described in countless comparative studies and daily observed in practice, relate largely to details; that behind and beyond these details there are shared and connecting elements; that these elements can be identified; and that it should be possible, without resorting to mere generalities, to formulate these elements in normative terms.

For the most ambitious project of this genre, see 1 *Formation of Contracts—A Study of the Common Core of Legal Systems* (Schlesinger ed. 1968).

Article 3(h) of the European Community's Rome Treaty lists as an objective: "the approximation of the laws of Member States to the extent required for the proper functioning of the common market." The process of approximation or harmonization of legislation among the EC's 12 members accelerated under the 1987 Single European Act, leading to the establishment of a competitive internal market in Europe at the end of 1992. By 1995 the European Union could have 16 members.

6. Professor Goebel sees the transnational or comparative lawyer as a cultural broker. Why might American lawyers be particularly well-suited to this task? Why not? On the other side, by 1992 the District of Columbia and ten states had statutes granting the status of legal consultant to qualified foreign lawyers:

Alaska, California, Connecticut, Hawaii, Michigan, New Jersey, New York, Ohio, Oregon, and Texas. See Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 Fordham Int'l L.J. 556 (1991-92).

7. There is a trend in the United States and elsewhere leading to multi-city law firms that are evolving into multi-country law firms. Multi-national corporations desire the convenience in dealing with the same firm on a global basis. The American firms with the most foreign offices include Baker & McKenzie (Chicago), Coudert Brothers (New York), Sidley & Austin (Chicago), White & Case (New York), and Graham & James (San Francisco). Baker & McKenzie in 1992 had 1,600 lawyers in 50 cities worldwide, including all the civil law countries surveyed in this volume.

8. As a matter of professional ethics, American lawyers should be responsible to their clients to recognize questions of foreign law. Once such a question is recognized, the lawyer is obliged either to deal competently with the foreign law point herself or with expert assistance, or to advise her client that another attorney or foreign counsel should be retained. See ABA Model Code of Professional Responsibility, Canon 6, EC 6-3 (1980); M.W. Janis, *The Lawyer's Responsibility for Foreign Law and Foreign Lawyers*, 16 Int'l Law. 693 (1982). For an example of a court's public admonishment of an attorney who misrepresented a Mexican judgment due to his lack of knowledge of Spanish, see *In re Disciplinary Action Curl*, 803 F.2d 1004 (9th Cir. 1986).

9. For further material on practical comparative lawyering, see Hans W. Baade, *Comparative Law and the Practitioner*, 31 Am. J. Comp. L. 499 (1983); Dennis Campbell, ed., 1-2 *Transnational Legal Practice: A Survey of Selected Countries* (1982); Linda S. Spedding, *Transnational Legal Practice in the EEC and the United States* (1987); Richard H. Wohl, Stuart M. Chemtob & Glen S. Fukushima, *Practice by Foreign Lawyers in Japan* (1989).

10. Professor Merryman presents five propositions in his article, some of which are useful in scientific comparative law. Why is proposition (3) explanatory and proposition (4) not?

11. Consider Professor Alan Watson's critique of theories of law and development (as well as of law and society):

Let me sum up my thesis. All legal rules are created by a cause. The cause of their creation is commonly but not always rooted in social, economic or political factors important to the life of the society or its leaders. Likewise reasons can be given for the continuance of existence of legal rules. The reasons for their continued existence are, I believe, often factors which have no direct importance for the life of the society or its leaders. Often, indeed, the rules of law are in conflict with the best interests and desires both of the ordinary citizens and the ruling elite. Legal rules, once created, live on. They are frequently remote from the experience and understanding of non-lawyers, and are kept in existence by factors such as the absence of effective

machinery for radical change, by indifference, by juristic fascination with technicalities, and by lawyers' self-interest.

One of the most striking features of legal rules is their power of survival. Many, many rules endure for centuries with only minor modifications, both in their own land and abroad. The effect of this for the relationship between law and society is grossly underestimated. Theories of law and society, and of legal development, tend to focus on important innovations. This leads to the impression of a very close inherent relationship between law and the society in which it operates. If one looked more at the continuing life of legal rules a different picture would appear.* 21

Watson, *Society and Legal Change* 7-8 (1977). How is his criticism different from that of Merryman in the Note on Law and Development, *supra*?

12. What are some of the special difficulties that one might have in researching a Japanese legal question? Do you believe that problems similar to those described by Professor Henderson arise in researching French or Mexican law?

Consider the view of Max Rheinstein, *Comparative Law—Its Functions, Methods and Usages*, 22 Ark. L. Rev. & B. Ass'n J. 415, 418-19 (1968):

More sophisticated is the comparison of legal terms and concepts. "Mortgage" is a word of the English language. Can it be used as a translation of the French word "hypothèque"? The two terms seem to be equivalent, but on closer investigation it turns out that, while they have a common core, they have different fringes. Is the English term "consideration" equivalent to the French term "cause"? The answer is again: to some extent yes, to others no....

Problems of this kind can be crucial in the translation of a statute, a judicial opinion, an international treaty, or a business contract. The attorney who advises an American firm in negotiations with a firm abroad must know in what meaning a legal term appears in the framework of a foreign system, and he must be loath to assume that it can always be rendered by simply translating it into what may be believed to be its equivalent in American legal parlance.

See Martin Weston, *An English Reader's Guide to the French Legal System* (1991).

13. The following excerpts illustrate the variety of methods available for teaching and scholarship in comparative law. Is the writer principally interested in

* The theory of this book is in conflict with the words of L. M. Friedman:

"Some of the old is preserved among the mass of the new. But what is kept of old law is highly selective. Society in change may be slow, but it is ruthless. Neither evolution nor revolution is sentimental. Old rules of law and old legal institutions stay alive when they still have a purpose—or, at least, when they do not interfere with the demands of current life"; *History of American Law* (New York, Simon and Schuster, 1973), p. 14.

the practical applications of comparative law, in theory-building about law, in the cultural uses of comparative law, or in something else?

D.COMPARATIVE LAW METHODS

1.SCIENTIFIC EXPLANATION IN COMPARATIVE LAW

John Henry Merryman, Comparative Law And Scientific Explanation, In Law In The United Statesof America In Social And Technological Revolution 81, 82-84 (John N. Hazard & Wenceslas J. Wagner Eds. 1974).

It is clear that certain kinds of activity sometimes loosely associated with comparative law actually involve no comparison. A description of a foreign legal system is an obvious illustration. The typical symposium is another. Such works may provide a basis for comparison, but they are not in any acceptable sense comparative.

Comparison can be undertaken in order to illustrate a proposition, in order to assist in description, or in order to explain. Thus

(1) Constitutional courts exist in some European nations but not others—in Italy, for example, but not in France.

Is comparative in only an illustrative sense. Italy and France are compared in terms of a variable common to both of them (the presence or absence of a constitutional court), but the purpose is merely to provide concrete illustration of a general statement.

In comparative law, description is the most common function of comparison. Thus most descriptions of foreign legal systems employ comparison as a way of adding meaning to a descriptive statement. For example, consider the following paragraph taken from a description of European dogmatic legal science by an American writer:

Although the common law world has seen occasional brief trends toward the kind of thinking that characterizes legal science, it has never really caught on here. Legal science is a creation of the professors—it smells of the lamp—and our judge-dominated law is fundamentally inhospitable to it. Common law judges are problem solvers rather than theoreticians, and the civil law emphasis on scientism, system-building, formalism, and the like gets in the way of effective problem solving. It also diminishes the role of the judge in the legal process, to the advantage of the legislator and the scholar. Both sociological jurisprudence—which is the opposite of abstraction, formalism, and purism—and legal realism—which rejects scientism and system-building—emphasize the difficulty and the

importance of focusing on the judicial process. Both have flourished in the common law world, and particularly in the United States.

The purpose of this sort of statement is to add meaning to a description of one aspect of a foreign legal tradition by contrasting it with a comparable aspect of another legal tradition that is familiar to the reader.

Comparison can be said to have an explanatory purpose if its objective is to produce or to test one or more *general explanatory propositions*. A proposition is *general* if all its terms are general. Thus

(2) California is a community property jurisdiction. is not a general proposition, but

(3) Developed legal systems contain procedures for controlling administrative legality.

is a general proposition. Not all general propositions are explanatory. Thus

(4) Administrative legality should be controlled.

is general but not explanatory. Proposition (3), however, is both. Its terms are general and it states a relationship between variables, in this case “developed legal systems” and “procedures for controlling legality.” It is this quality of expressing or qualifying relationships between two or more variables that constitutes “explanation.”

It is important to distinguish between general explanatory propositions and prescriptive statements. Thus

(5) One who wrongly injures another must pay compensation.

is prescriptive, not explanatory. The difference is fundamental; it is the difference between the is and the ought. Proposition (3), which is explanatory, states a conclusion induced from empirical observation. Proposition (5), which is prescriptive, states a desired social outcome if certain facts are found to exist.

Empirical observation for the purpose of generating or testing general explanatory propositions is the essence of the scientific method. Empirical observation for other purposes (e.g. to determine whether a criminal defendant did or did not commit the criminal act) does not fulfill this definition. In general, fact-finding for decision-making purposes, even though done with “scientific” instruments by “scientists,” is distinguishable from empirical observation for general explanatory purposes. Conversely, general explanatory propositions that are not based on or tested by empirical observation (for example, certain systems of religious belief) are “unscientific.”

Obviously, classification as scientific or unscientific has no invidious connotation; scientific activity and scientific explanation are not necessarily better, worse, or more or less true than other kinds. One kind of objective of comparative law is to establish and test general explanatory propositions on the basis of empirical observation. I shall here use the shorter term “explanation” to refer to this objective. Explanation is distinguished from description of one legal system, even though foreign, which involves no comparison. For the latter type of activity “foreign law” is an appropriate term. Explanation is also distinguished from illustration and description, even though they involve comparison.

Explanation, although not inherently superior to descriptive or illustrative comparative law, is distinguishable in a number of ways from them. One of the most obvious differences is that explanation may provide a basis for prediction. If we know in sufficient detail the nature of certain relationships that have existed between two or more variables in the past, and if we have a reasonable basis for the expectation that such relationships will persist, we can predict the consequences of alternative courses of action with reference to one or the other of such variables. Such ability to predict both satisfies a commonly held desire to penetrate the mystery of the future and has great social utility. Accordingly, those comparative lawyers who would find satisfaction in the pursuit of predictability should eventually be drawn to explanation.

2.FUNCTIONALISM IN COMPARATIVE LAW

*Konrad Zweigert & Hein Kotz, 1 Introduction To Comparative Law 31
(Tony Weir trans., 2d ed. 1987)*

The basic methodological principle of all comparative law is that of *functionality*. From this basic principle stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and so on. Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfill the same function. This proposition may seem self-evident, but many of its applications, though familiar to the experienced comparatist, are not obvious to the beginner. The proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results. The question to which any comparative study is devoted must be posed in purely functional terms; the problem must be stated without any reference to the concepts of one’s own legal system. Thus instead of asking, “What formal requirements are there for sales contracts in foreign law?” it is better to ask, “How does foreign law protect parties from surprise, or from being held to an agreement not seriously intended?” Instead of asking, “How does foreign law regulate *Vorerbschaft* and *Nacherbschaft*?” one

should try to find out how the foreign law sets about satisfying the wish of a testator to control his estate long after his death....

The beginner often jumps to the conclusion that a foreign system has “nothing to report” on a particular problem. The principle of functionality applies here. Even experienced comparatists sometimes look for the rule they want only in the particular place in the foreign system where their experience of their own system leads them to expect it: they are unconsciously looking at the problem with the eyes of their own system. If one’s comparative researches seem to be leading to the conclusion that the foreign system has “nothing to report” one must rethink the original question and purge it of all the dogmatic accretions of one’s own system.

3. THE LABORATORIES OF COMPARATIVE ANALYSIS

Mauro Cappelletti, Monica Secombe & Joseph H.H. Weiler, Integration Through Law: Europe And The American Federal Experience, A General Introduction, In 1 Integration Through Law Bk. 1 At 3, 5-6, 9-10 (Cappelletti Et Al. Eds. 1986)

This Project sets out to examine the role of law in the process of European integration as seen against the American federal experience. The Project is divided into two parts: in Part One, in a series of introductory studies written by teams of European and American scholars, the political, legal and economic context in which the integration process has taken, and is taking, place is analyzed. These contextual studies are followed by analyses of the Australian, Canadian, Swiss and German federations, thereby widening the comparative context of the Project. Then the actual process of governance in the European Communities and the United States is examined: a study on political institutions and decision-making precedes an examination of tools and instruments for integration and an analysis of the judicial process. Part One concludes by looking at five core areas of integration which in our view represent the basic elements for the eventual emergence of a European identity. Part Two of the Project, which is open-ended, deals in a comparative manner with areas of substantive law and policy in the Community and the United States. The first five monographs cover environmental protection policy, consumer protection policy, energy policy, corporate law and capital market harmonization and regional policy....

In political, legal and economic analysis one does not have the benefit of the laboratory conditions available to the natural and some of the human sciences. The comparative and historical methods thus become the only available “laboratories” for dealing with the issues, general and specific, which such analysis involves. The purpose of such “laboratories” is two-fold. On the one hand, they provide an empirical basis of concrete data upon which to found realistic, not merely abstract, speculation. On the other hand, especially in legal research,

historical and comparative analysis is a fundamental instrument for overcoming the dangers of sheer empiricism and value-free positivism. History and comparison serve to reveal actual societal problems and needs, developments and trends, shared by certain societies —highlighting, say, the problem of pollution or the need for consumer protection in economically advanced societies.

Thus, data can be seen in the light of their contribution to the solution of a given problem and to the satisfaction of a given need, and can therefore be *evaluated*—ultimately, as “progressive” or “backward,” “just” or “unjust”—within the context of a given development and trend. Suppose the problem illustrated by historico-comparative analysis consists in the economic inconveniences deriving from certain barriers to movement of persons or goods and the need to overcome such barriers. Comparative legal analysis will then be brought to “evaluate” laws, institutions and techniques in relation to that particular problem and need. This approach represents, in a real way, a “Third School” of legal thinking, different both from mere positivism, for which law is a pure *datum* not subject to evaluation, and from evaluation of such *datum* based on abstract, airy, inevitably subjective criteria such as “natural law” principles. Historico-comparative analysis, on the contrary, provides a yardstick for objective evaluation, even though not an “absolute” one, abstract from the “contingencies” of space and time, but one which is relative to the particular problem and need, to the concrete development and trend which have emerged from that analysis....

Thus comparative analysis contains by its very nature an inevitable dialectical tension. On the one hand the subjects of comparison must have a point of identity or similarity so as to render analysis meaningful. This point may be the function of a political institution or legal mechanism, or the structure or even the material-substantive content of a rule or a policy; or above all, the problem or the politico-economic conditions which suggest the need for a legal “answer” or “solution.” But an identity or similarity of one factor will frequently be accompanied by differences in relation to others. Comparative analysis becomes meaningless in conditions of identity. Total identity or total dissimilarity are, thus, equally unprofitable in this kind of enterprise. Instead it is the task of the comparativist to spell out the interplay between similarity and diversity, divergence and convergence.

The specific purposes of this particular method are manifold. There may be a policy objective—to learn about and perhaps eventually transplant or modify existing legal institutions, policies or rules by reference to the experience of others. Another objective may be the attempt to better understand a given legal institution, policy or rule—transcending its specific manifestation in a particular legal-political order. Here one will typically try to identify the causes of any converging (or diverging) trends which spring from the array of problems and needs with which political and legal systems grapple. Last, but not least, the comparison of convergence and divergence gives us a unique perspective in which to analyze, understand and, as we said, to *evaluate* one’s own legal institutions and even to

foresee the probable future evolution within the trend of which they are a reflection. And, of course, seeing alternative approaches often stimulates us to ask questions about ourselves, questions which otherwise might not have been perceived.

4. LEGAL TRANSPLANTS

Alan Watson, Society And Legal Change 98-99, 102-05, 140-41(1977).

Comparative Law ... was, I suggested, a study of the relationship of one legal system and its rules with another. This relationship, I thought, was discoverable only by a study of the history of the system or of the rules, and that therefore Comparative Law was Legal History concerned with the relationship between systems. But I suggested Comparative Law was also something more. In studying the similarities and differences between systems which have a relationship, one is better able to understand the particular factors which actually do shape and have shaped legal growth and change, and this, I hinted, may be the easiest approach to an appreciation of how law normally evolves. Hence, Comparative Law is also about the nature of law, especially about the nature of legal development, and is a branch of Jurisprudence.

The main type of relationships between systems arises because one borrowed from the other, or because both borrowed from a third. Since borrowing—often with modifications—is the main way in which the law of any Western system develops, at the centre of study of Comparative Law should be Legal Transplants....

I accepted as true—as I still do—the impossibility of Comparative Law ever being completely systematic

A study of legal transplants may tell us a great deal about the nature of law.... [The motivating elements in transplantation are] not necessarily incompatible with the rule adopted being the best available for the borrowing system.

But it seems, in fact, that the factors which determine which system is borrowed from often have nothing to do with the needs of the borrowing society. In the first place, the donor system may be chosen because of the general respect in which it is held. This has been true above all of Roman law, but also of English law and, after the French revolution and the promulgation of the Code civil, of French law. At a rather later date it has also been true of German law, as the influence on Japan and Greece shows....

No doubt the remembrance of past glory would make the reception of Roman law easier in mediaeval Italy, and the theory that the Holy Roman Empire was a continuation of ancient Rome would play a very important role in Germany, but the general high quality of Roman law, the accessibility of the legal materials in the *Corpus Juris Civilis*, and the richness of the materials within a reasonable

compass were the final and vital determinants. Obviously Napoleon's conquests helped to spread French law even beyond the conquered territories, but the dominant influence of French law in the nineteenth century was more powerfully due to the Code civil and the absence of plausible rivals. For us, the important fact is that once a system is regarded with enough respect, its rules will be borrowed even when the particular rule is inefficient and inappropriate....

In the second place national pride may determine that borrowings should be made, or should be restricted, from some particular system. The consequence is not that the spiritual nationalists will then invent *de nouo* but borrow from some other system.... Scots law is a "mixed system" with roots deep in the Civil Law and the Common Law. At times in her history Scotland has drawn more from one root than the other. The fascinating thing ... is the very real feeling that it is better to borrow consciously from Civil Law systems (including Greece and Ethiopia) than from the Common Law (including England) because the former, but not the latter, is in conformity with Scottish legal principles and tradition....

A third factor which influences the choice of foreign law to be adopted, and which is independent of the quality of the law is language and accessibility. The Reception of Roman law was greatly helped by the fact that the *Corpus Juris Civilis* was in Latin, a language then known to all learned men, and contained the law within reasonable dimensions. Likewise the victory of Common Law over Civil Law in the United States owed much to Blackstone's *Commentaries on the Laws of England* largely because they were written in English and contained so much legal detail in one work....

As a fourth factor one may mention past history. It is enough here to remark that neighbouring countries in Africa may have basically a Common Law or a Civil Law system, depending on who was the colonising power.

5.NOTE ON LAW AND DEVELOPMENT

During the 1960s and 1970s there was considerable interest in the U.S. in "law and development," with encouragement and funding from the Agency for International Development (a federal agency), the Ford Foundation, the International Legal Center (a Ford Foundation spin-off), and the Asia Foundation. In its least attractive form, law and development meant American lawyers providing "technical legal assistance" to developing nations in Latin America, Africa, and Asia. The activity, though often well-meant, was characterized by ill-prepared activism, conceptual confusion, and monumental presumption. For example, it was never made clear why American lawyers, even if they were comparative law professors (many were not), were in a position to give useful advice to lawyers in nations with different—often older and, arguably, more "developed"—legal systems. By the latter 1970s the law and development movement began to lose momentum. For informed retrospective evaluations of the movement see James A.

Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (1980); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 Wis. L. Rev. 1062; Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 Am. J. Comp. L. 457 (1977). Professor Merryman sums it up this way (*id.* at 481):

These characteristics: unfamiliarity with the target culture and society (including its legal system), innocence of theory, artificially privileged access to power, and relative immunity to consequences, have been typical of many law and development proposals and programs for the third world. Put another way, we were probably incompetent to propose or execute third world law and development action, we were encouraged (by our own self-image, by the foreign assistance psychology and by thirdworld conditions) to do so, and we did not suffer the consequences of having done so.

Merryman proposed that law and development be revived by changing its program from action (i.e., advising the third world) to inquiry (i.e., studying law and social change in the third world) and changing the field's title from "law and development" to "comparative law and social change," arguing that this provides (*id.* at 483):

an opportunity to rejuvenate comparative law, to enrich law and society and to strengthen the role of the social sciences and the humanities in legal scholarship. It casts the U.S. scholar in the third world in a more modest and appropriate role, as inquirer rather than adviser, and puts the developing nation in the more dignified position of host rather than target.

For the results of one such study, called SLADE (for Studies in Law and Development), compiling quantitative data on many features of the legal systems of Chile, Colombia, Costa Rica, Italy, Peru, and Spain from 1945 to 1970, see John Henry Merryman, David S. Clark & Lawrence M. Friedman, *Law and Social Change in Mediterranean Europe and Latin America: A Handbook of Legal and Social Indicators for Comparative Study* (1979); Merryman & Clark, *Comparative Law: Western European and Latin American Legal Systems* (1978).

6.[POLITICAL/IDEOLOGICAL COMPARATIVE LAW?]

*Hortatory Comparative Law, Mary Ann Glendon, Abortion and Divorce In Western Law 5-8 (1987)**

The protagonist of [Plato's] *Laws* is a traveler far from his native city, an old man who doesn't even have a name. Plato calls him the Athenian Stranger. In some ways he reminds us of the Socrates of the earlier dialogues, but he is less

* For permission to photocopy this selection, please contact Harvard University Press.

charming and more pious, less elegant in diction and more urgent in purpose. It may be that this is as close as we get to hearing the voice of Plato himself, but if so, it is the Plato who was approaching the end of his own journey through the world.

The dialogue takes place between the Athenian and two other elderly pilgrims, a Cretan and a Spartan, whom he has encountered on the road from Knossos to the cave and temple of Zeus on the island of Crete. Both Crete and Sparta were renowned in the ancient world for their laws, and the shrine which is the travelers' destination commemorates the divine origin of the laws of Crete. At first it seems that the Athenian may have come to Crete to learn about these laws, for the dialogue opens with his blunt question to the others: "Is it a god or some human being, strangers, who is given the credit for laying down your laws?" When Kleinias the Cretan and Megillos the Spartan reply, somewhat equivocally, that their lawgivers were indeed gods, the Athenian Stranger proposes that it might be pleasant to beguile the time on their journey with conversation about the government and laws of Crete and Sparta. Soon we learn that Kleinias has just been appointed to a commission charged with the duty of establishing a new Cretan colony, complete with a constitution and laws. He has been told that if he and his colleagues should discover some laws from elsewhere that appear to be better than Cretan laws, they are not to worry about their being foreign. It would thus be helpful to him, Kleinias suggests, if the three travelers could spend the day founding a city in speech as they stroll and rest on the way to their common destination.

This request appears to be what the Stranger was waiting for all along. No longer the idly curious student of foreign institutions, he now dominates the ensuing discussion, which ranges over the great perennial questions of the purpose of law; the relations between law and custom, law and power, law and justice, law and what we would today call a particular culture, courts and legislatures; and the extent to which the law should attempt to regulate the private lives of citizens. Along the way no important political or moral principle is left unexamined. Family law, starting with marriage and the upbringing of children, is a central topic.

At the end of the day, the Stranger reminds his companions that their aim has been to devise laws for a real city and not some ideal republic; consequently, the law making process will have to be an ongoing one. Since the city must constantly be reexamining and revising its laws, its Guardians would do well, he advises, to send out mature citizens to study especially good laws elsewhere, and to seek assistance from wise persons wherever they may be found, even in ill-ordered cities. And, finally, he says that the city should always be willing to receive strangers of either sex who have something important to teach or who have come with a serious desire to learn. How can the comparatist not be enchanted? True, we suspect that for Plato, as for Montesquieu and Tocqueville, discourse about foreign systems is in part just a safe and convenient literary device for

raising certain issues about politics and law at home. Even so, we are won over. But won over to what?

From the beginning to the end of the *Laws*, no matter what legal subject is raised, it is education which always comes to the fore. The ultimate concern here, as in *The Republic*, is not so much with the right laws for the state, but with the right education for citizenship. The Athenian Stranger continually brings the discussion around to the classical idea that the aim of law is to lead the citizens toward virtue, to make them noble and wise. The Stranger stresses, further, that the lawgiver has not only force but also persuasion at his disposal as a means to accomplish this aim. He drives the latter point home by comparing the legislator who simply issues commands to a certain kind of doctor whom he calls the slave doctor. The slave doctor, a slave himself, has learned what he knows of medicine by working as the servant of a doctor. His manner of practicing his profession is to make a hurried visit, to order whatever remedy experience suggests, and then to rush off to the next patient. By contrast, the freeman's doctor begins by getting to know the patient and his family. He inquires far back into the nature of the disorder, and when he has got as much information as possible, he then begins instructing the patient with the aim of restoring his health by persuading him into compliance. This doctor gives his prescriptions only after he has won the patient's understanding and cooperation.

As for the law maker, the Athenian Stranger asks, should he merely issue a set of commands and prohibitions, add the threat of a penalty, and then go on to another law, offering never a word of advice or encouragement to those for whom he is legislating? This kind of law may be fit for slaves, he suggests, but surely a legislator for free men should try to devise his laws so as to create good will in the persons addressed and make them ready to receive intelligently the command that follows.

I bring up these old ideas about law for two reasons. First, they are essential to understanding some of the most important differences between the approaches of Anglo-American and continental European law In addition, they seem to be closely connected to some of the most interesting contemporary American thinking about law. In England and the United States the view that law is no more or less than a command backed up by organized coercion has been widely accepted. The idea that law might be educational, either in purpose or technique, is not popular among us. But on the European continent, older ideas about law somehow survived the demolition of classical political theory and have persisted, at least as undercurrents, into the modern age. The rhetorical method of law making appears not only in the great continental codifications, but also, here and there, in all sorts of contemporary European legislation. It is most especially evident in continental family law.

In England and the United States, where prevailing legal theory tends to deny or downplay any pedagogical aim of law, legislation tends to be in the form of the prescriptions of the slave doctor. But recently a few American scholars have

begun to talk about looking at law in a way that would not have sounded entirely strange to Plato. James Boyd White suggests, for example, that “law is most usefully seen not... as a system of rules, but as a branch of rhetoric,... as the central art by which community and culture are established, maintained and transformed.” And from another branch of the human sciences has come a related invitation or challenge directed specifically to comparatists. In his Storrs lectures at Yale Law School, the anthropologist Clifford Geertz advised comparative lawyers that they would learn and contribute more if they focused on the fact that law is not just an ingenious collection of devices to avoid or adjust disputes and to advance this or that interest, but also a way that a society makes sense of things. It is “part of a distinctive manner of imagining the real.” From this perspective, the interesting comparisons among legal systems should lie, first, in their manner of characterizing factual situations so that rules can be applied to them, and second, in how they conceive of the legal norms themselves. It is to be expected that legal systems compared in this manner will differ in the “stories they tell,” the “symbols they deploy,” and the “visions they project.” The comparatist’s task thus becomes a venture into cultural hermeneutics.

7. NOTES AND QUESTIONS

1. What is functionalism as a methodology? How does it affect the questions posed for investigation? How does the project by Cappelletti, Seccombe, and Weiler illustrate functionalism? What do they mean by the observation that Comparison of similarities and differences involves an “inevitable dialectical tension?”

2. In addition to the Florence integration project, professor Cappelletti has directed two other large-scale comparative law research programs. First, the access to justice project, commenced in the early 1970s at the Florence institute of comparative law and concluded in 1981 at the European university institute, captured the interest of lawyers, sociologists, political scientists, and anthropologists to achieve a better understanding of an important social dimension of law. *See* Mauro Cappelletti, gen. Ed., 1-4 access to justice (1978-79); *id.*, Ed., Access to justice and the welfare state (1981); Mauro Cappelletti, James Gordley & Earl Johnson, jr., *Toward equal justice: a comparative study of legal aid in modern societies* (2d ed. 1981). Second, the constitutional guarantees project dealt with certain human rights and their vindication in courts. *See* Mauro Cappelletti, *Judicial review in the contemporary world* (1981); Mauro Cappelletti & Denis Tallon, eds., *Fundamental guarantees of the parties in civil litigation* (1973).

3. Professor Watson argues for the study of legal transplants in comparative law. Is he a functionalist?

4. What does professor Glendon mean by “cultural hermeneutics” as a method of comparative law? What is hortatory law? Are there important examples

of law treated primarily as rhetoric in united states history? The fifteenth amendment (right to vote) to the US. Constitution between 1870 and 1964? The eighteenth amendment (prohibition) from 1919 to 1933?

5. We have seen a variety of points of view about the objectives and methods of “comparative law,” enough to suggest that quite different kinds of teaching and scholarship go on under that name. It will help in using this book to remember that the authors are primarily interested in *description* of legal *systems*—that is, of legal culture and the law machine—with references, where appropriate, to legal extension and legal penetration. Comparison, where it occurs, is there primarily to help describe some aspect of a foreign legal system.

6. The next chapter introduces basic questions arising in comparative law practice: that is, matters involving foreign parties or foreign laws. The following case illustrates how “foreign” law—here roman, Spanish, and French law—may find its way into a purely domestic controversy.

Chapter 4

THE SPECIAL HAZARDS OF COMPARATIVE LAW

A. INTRODUCTORY NOTE

(Again, I am transcribing the pertinent section from my essay to introduce the chapter.)

This chapter is a warning for the students not to overreach with the methodology discussed in the first chapter and with comparative law in general. It is in an important way a specific refinement of comparative methodology: whereas chapter one covers what to do, chapter two warns about what not to do. I emphasize the distinction between law and legal systems, and between official legal systems and actual practices within the official legal system and the possible existence of informal legal systems.¹²³ I then move on to more specific challenges, such as language. I point out to my students that they will spend three years in an American law school learning American Legal English, and they immediately understand that simple fluency in another language is not enough for legal work.

This chapter would include several specific examples of language challenges. For example, as discussed later in this essay, I point out that they will recognize the word “notary” easily, but that if they understand it to mean a person who certifies documents, such as the secretaries in the Office of Student Affairs at our law school, they will fail to understand that for the rest of the planet “notary” means a specialized legal professional. Consistent with my practice of providing examples relevant to purely domestic law practice, I also point out that they may well run into the need for legal translation here in the United States, when representing clients who speak languages other than English. It is especially important when litigating with the use of simultaneous translation, where errors in translation that are allowed to make it into the transcript may create a misleading record of the proceedings.¹²⁴

Language poses a major pedagogical challenge for the course. My students have repeatedly reported that they found the readings difficult to understand because they were written in “awkward” language. This seems to be most directly related to a general lack of skill in languages other than English on the part of the students. By contrast, the readings are often translations from languages other than

¹²³ For one of the most influential case studies on informal legal systems, see generally Hernando de Soto, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (1989).

¹²⁴ While clerking in the United State District Court for the District of Puerto Rico, I observed many trials in which simultaneous translation was required, and heard many “objections to the translation” made by multi-lingual counsel, and even corrections that had to be made by the presiding judges.

English, or the works of persons familiar with multiple legal languages who purposely choose words that may appear awkward to a monolingual English speaker, but that are common in the international language of law, especially because of the legal institutions and concepts that are common to the civil law tradition. This is the cultural gap that is most pertinent to a college or law school classroom in the United States, and one that I will strongly strive to bridge in my book. On the other hand, becoming even rudimentarily familiar with the common institutions and concepts can improve transnational legal communication immensely, even when the parties speak multiple languages.

B.SCOPE: LAW AS LEGAL SYSTEMS

1.NOTE ON “LAW” AS LEGAL RULES AND AS LEGAL SYSTEMS

[From the Merryman Casebook]

When we use such terms as comparative *law* and foreign *law*, and when we refer to the *law* of France or Italy, what do we mean? Do the authors quoted in this chapter use these terms to mean different things? Does the same person sometimes employ such terms in different senses? The question is basic and important.

Legal rules are what most people think of as law, and a good deal of the work of comparative lawyers is devoted to the description and evaluation of such rules. Much of the concern about differences in legal systems is phrased in terms of rules, and much of the effort toward unification of law is rule oriented. But there is a very important sense in which a focus on rules is superficial and misleading: superficial because rules literally lie on the surface of legal systems whose true dimensions are found elsewhere; misleading because we are led to assume that if rules are made to resemble each other something significant by way of *rapprochement* has been accomplished.

Rule-fixation is stronger in the culture of the civil law than in the common law because of the peculiar character and the extraordinary success of the French codification (of rules) and of 19th century German legal science (which was a science of rules). That fixation was easily and naturally transferred to 19th century continental comparative law (commonly called “comparative legislation” at that time, thus indicating both a focus on rules and the attitude that legislation was their principal source). Since comparative law as a field had its origins in Europe it is not surprising to find that the reverence for rules, and the relative absence of attention to other dimensions of the law, are prominent attributes of the work of comparative lawyers everywhere. Comparative law comes late to rule-skepticism.

To speak of the comparison of *legal systems* implies that there are significant differences between them. A focus on rules limits the attention to only one kind of difference and equates “legal system” with “legal rules.” A more adequate definition of a legal system, however, would include a number of

additional components: legal extension, legal penetration, legal culture, legal structures, legal actors, and legal processes. These are highly interrelated concepts, and each of them is further related to the form and content of the rules of law in the system. Like other social systems, the legal system has boundaries, and its components are interrelated by an internal logic. Legal extension and legal penetration help to define the boundaries of the legal system; the legal culture is its internal logic; legal structures, actors, and processes describe its component parts and the way they function.

In every society, much is left to custom and tradition, to religion, to informal negotiation and settlement, to social convention and peer influence, but the precise location of the boundaries between such non legal matters and those of legal concern is unlikely to be always and precisely the same. The range of variation becomes particularly significant if we identify law with the official legal system, manned and operated by the state.

The degree to which that system seeks to penetrate and control social life is often quite different from the extent to which it actually does so. For example, large numbers of Guatemalans, Brazilians, Ethiopians, and Indonesians live much of their lives relatively free of any substantial contact with the official legal system, which actually applies with most force to an urban oligarchy and rapidly loses its power as one moves down the socio-economic scale and away from the major cities. In a substantial number of such nations the paper legal system will look much like that of France or Spain or Italy, or of England or the United States. But if one looks at the actual role of law in the lives of important elements of the population the resemblance is only superficial.

Thus along two dimensions, the aspects of social life that the law proposes to affect and the extent to which it actually does so, the scale of divergence of legal extension and legal penetration between societies can be, and often is, substantial. Both the social reach and the social grasp of the law are important variables.

By "legal culture" is meant those historically conditioned, deeply rooted attitudes about the nature of law and about the proper structure and operation of a legal system that are at large in the society. Law is, among other things, an expression of the culture; ideas about law are part of the intellectual history of a people. Such ideas are very powerful; they limit and direct thinking about law, and in this way they profoundly affect the composition and operation of the legal system. A prominent example is found in the quite different prevailing views of the role of judges in the civil law and common law, but there are many others: the effects of the separate existence of courts of law and of equity during the formative period of the common law; the conflict in pre-Revolutionary France between the king and the provincial *parlements*; the role of the civil jury in the common law; the resistance to Roman law influences in England during the formative period of the common law; the list is endless. Differences in modern legal systems can often be explained only by reference to such historical-cultural influences, which have great contemporary power.

Courts, legislatures, administrative agencies, law schools, and bar associations are all familiar examples of “legal structures.” They are the composite units that do the work of the system, and their composition and attributes vary widely among legal systems: one can, for example, contrast the German system of federal supreme courts and the Supreme Court of the United States.

“Legal actors” refers to the professional roles played by participants in the system: advocates, notaries, police, judges, administrative officials, legal scholars, etc. Here again there are substantial areas of divergence: consider the civil law notary and instructing judge, who have no counterparts in the common law.

“Legal processes” refers to legislative and administrative action, judicial proceedings, the private ordering of legal relations, and legal education. Here the range of divergence is illustrated by contrasting criminal proceedings in English and Italian courts, or legal education in, say, Belgium and New Zealand.

Each of these aspects of the legal system is a potential dimension of convergence and divergence. Each is, in a very important way, more fundamental than rules of law to a description and comparison of the civil law and common law. The point can be illustrated by a metaphor: let the complex of legal structures, actors, and processes be thought of as the machinery of law—as the law machine. Certain kinds of rules, the kind Professor Harta calls “primary rules of obligation,” are commonly the focus of rule-centered legal study. A typical civil code is made up primarily of such rules, which can be thought of as statements of demand on the law machine. An example of such a rule is Article 1382 of the Code Napoleon, to the effect that one who by his fault injures another is liable for compensation. Thus, if X unjustifiably injures Y (the “if” part of the rule), it should follow that Y will be compensated (the “then” part of the rule).

However, the result does not necessarily follow. Some legal work must be done in order to bring it about. The law machine must be set into operation, in this case by Y bringing the appropriate action against X in the appropriate French court. Eventually, if the machine functions properly, an official judgment will be issued to the effect that X owes Y a certain amount of money as compensation. If X does not pay, Y can make a further demand on the law machine to have X’s property seized and sold in order to satisfy the judgment. Again, if the machine functions properly (and if X has property within the court’s jurisdiction that can be seized and sold for this purpose), Y may be paid.

It is important that the society have appropriate primary rules of obligation, appropriate in the sense that they are directed toward controlling undesirable social behavior and encouraging people to do what is socially beneficial. The determination of what kinds of conduct to encourage and what kinds to discourage is a very complicated and often controversial matter. But, fascinating as such questions are, they are not truly *legal* questions. They are, instead, primarily social, economic, and political questions. For example, the question whether, as a matter of legislative policy, there should be a rule requiring X to compensate Y if X

damages Y's property is only incidentally a legal question. The same is true of most other primary rules of law.

What is "legal" about a primary legal rule is that it assumes, or calls into play, the law machine. It is the law machine that does the legal work for the society, that consumes the resources, that determines how and to what extent the precept stated in the primary rule shall be translated into social consequences. The primary legal rule is basically a statement of a desired social outcome. The law machine is the mechanism for bringing it about. When we study primary legal rules we are studying what society asks. The mere request will of course affect social behavior to some extent (although we know very little about the nature and intensity of that effect). But if we are really interested in knowing something about the legal system in any society we quickly have to expand our vision to include the law machine—the complex of legal structures, actors, and processes. We will not get very far in that effort by studying merely the rules of law.

There clearly are important interrelationships in any society between the extension and penetration of the law, the legal culture, the law machine, and the rules of law. Still, it takes little empirical investigation to establish that the legal rules in two societies can look very much alike without insuring that other dimensions of the legal order are equivalent to each other. It may be that similar primary rules exercise (or symbolize) a deeper converging influence, but it is equally possible that the same words have totally dissimilar functional meanings in the two systems.

In brief, an adequate description of the civil law requires attention to all dimensions of the legal system and a de-emphasis on rules of law. This is particularly disagreeable because rules are so easy to find and to read, while it is very difficult to find reliable information in law libraries about legal extension, legal penetration, the legal culture, and the structure, composition, and operation of the law machine.

2.EXAMPLE: THE COMPARISON OF JAPANESE LAW

[From the Merryman Casebook] Dan Fenno Henderson, The Japanese Law In English: Some Thoughts On Scope And Method, 16 Vanderbilt Journal of Transnational Law 601, 607-12 (1983).

Issues relating to the concept of law in the culture, the role of law in the society, and the interplay of law and language must be confronted when investigating the law of a country as different as Japan. These issues become more acute in comparative jurisprudence because of the foreign language component. Any comparativist researching English translations of Japanese law must confront these critical issues whether his interest is macrosystemic or microdoctrinal, and whether his focus is directed toward academia or legal practice.

A. Concept of Law in Japanese Culture

First, the idea of law itself must be examined. Until the creation of the Great Court of Cassation in 1875, Japan had nothing resembling an independent judiciary, no tradition of justiciable law, and no separation of the judiciary from the administration. Even after 1875, the new courts handled only ordinary civil and criminal cases. Under the Meiji Constitution, which had become effective in 1889, a single administrative court with only token jurisdiction was established to hear administrative law cases. Essentially, the political administration remained above the “law.” When the new constitution took effect after World War II, the ordinary courts were empowered to hear all suits against administrative agencies as well as suits involving the constitutionality of legislation. The brief experience of only a century of justiciable law in civil cases and roughly thirty-five years in administrative and constitutional litigation has an important message for comparativists, especially in Japan where traditional social controls have been extraordinarily refined. Indeed, the traditional Japanese society was rule-ridden and behavior was minutely prescribed by society, not justiciable law.

Whatever one’s position may be on the usefulness of distinguishing domestic “law” and “administration,” or “custom” and “justiciable law” (or “law,” “justice,” and “politics”), it is misleading and confusing for comparativists to use, without stipulating definitions, the terminology of United States justiciable law (e.g., court, judiciary, bar, bench, appeal, trial) when discussing a system without an independent judiciary. In addition, these terms must be used carefully in a discussion of a system having a brief and superficial experience with justiciable law to avoid exaggerating the role of law. These words are value-laden for the English language reader and inevitably will attribute important characteristics to a system unless the entire legal culture is clearly explained....

B. The Role of Law in Japanese Society

For historical reasons, even today the role of law in Japanese society is minimized. As used here, the word “law” has a special meaning: it connotes “justiciable law” or “lawyer’s law,” which implies a verbalized written rule, typically a statute, enacted by a legislature representing voters. This law is *justiciable* because a plaintiff can obtain a favorable judgment by filing a suit in a court, following proper procedures, and proving his claim by a preponderance of acceptable evidence....

This new alien system of law has been superimposed on a highly unusual society. Isolated from the world for two centuries, Japan became a decentralized system of small feudal domains, each made up of largely self-governing village communities of confucianistic family unity.* This kind of society produced a

* For a capsule presentation of the pre-modern system in the Tokugawa era (1600-1808), see 1 D. Henderson, *Conciliation and Japanese Law: Tokugawa and Modern*, chs. 2-3 (1965); Hiramatsu, *Tokugawa Law*, 14 *Law in Japan: An Annual* 1 (D. Henderson trans. 1981).

homogeneous, highly immobile, collectivistic people, normally dependent on each other (within the family and the village) for their entire lives. Most community matters were settled communally without a formal “court.” If the annual taxes were paid by the village to the overlord, who in turn paid tribute to the Tokugawa Shogun, the villagers were left alone in their dealings with each other.... Behavioral patterns, registries, and written rules and records were precise. On the whole, compliance by the Japanese people was remarkable because it was self-imposed by their own small, closed communities.

The Japanese people may not be described appropriately as “law-abiding” because the controls were more socially ingrained and enforced by immobility and communal adhesion than affected by external law. In the home, workplace, and neighborhood, behavior was so socially prescribed and enforced that state-imposed law was not only absent but quite superfluous in private dealings. It is critical for lawyers to understand that today Japan is still socially disciplined to a remarkable degree.

Despite the country’s technological inferiority when opened to the West by Commodore Matthew Perry in 1853, Japan was already quite sociologically advanced, indeed quite “modern,” if modern means adaptable to the rigors of late twentieth century industrial productivity. The workplace has become what the Japanese wryly call the “second village” because livelihood, welfare, and success in life depend on performance in the same workplace with the same people, ideally for an entire career. This concept of the workplace accounts for the immense corporate dedication of Japanese employees. Today, their ability to focus social energy on the task of improving corporate productivity to compete with rival corporations is incomparable. Japanese competitors also have a strong tendency to group together against foreign businesses.

During the hundred years of experience with imported western justiciable law, the Japanese have developed a sophisticated central bureaucracy, a system of administration, and a structure of private law based on imported codes. The legal literature produced in this period—treatises, commentaries, and case law—is voluminous, systematic, and refined. The mix of social and legal institutions, however, remains subtle and elusive to the comparative lawyer with little exposure to Japanese society.

C. The Interplay of Law and Language

The third problem of the comparative method is the relationship of language to law. The language problem is both subtle and complex for the comparativist because of the difficulty of the Japanese language and the inherent parochialism of monolingual lawyers. If the foreign law is in another language and the lawyer is monolingual, he can hardly understand the nuances presented by the problem. The lawyer easily may suppose that “law” and its major concepts are quite platonic; that is, extant “things” in the real world to which his language assigns names. By equating *fuho koi*, *keiyaku*, and *bukken* with English torts,

contracts, and property, respectively, a lawyer could assume that he is in command of Japanese law and capable of applying it to his client's problem. This type of lawyer tends to be a chronic, unthinking "word substitutionist," who must obtain the assistance of the comparativist lawyer to avoid making irreparable errors....

The best way to approach the law/language problem in comparative law is by reviewing the problem first in the relatively simple setting of the United States judicial process. The term "interpretation" designates the many meanings that lawyers can find in any rule that is applicable to their particular case. On the other hand, "application" designates the single meaning of the law that is ultimately fixed in the court's holding. Interpretation is the product of the client's interests, multiplied by his lawyer's ingenuity in using and abusing language. Multiple meanings are a normal quality of the abstract language used in statutes. Lawyers do not cause the interpretational malady suffered by a statute, they only exploit its symptoms.

The rule of law and judicial process, which embody the interpretation and application problems accruing from the inherent imperfections in language, are now parts of a political value system embraced by both the United States and Japan. A modicum of understanding of the imperfections of technical language in a single legal system is but a first step for the comparativist working with Japanese law in English. Translation of laws from Japanese to English (or vice versa) compounds the problems of legal ambiguity.... Translation of Japanese law into English requires sensitivity to structural and conceptual differences in the civil law and common law systems, as well as an awareness of the peculiarities of Japanese legal culture and the uses of law in Japanese society..

C. LANGUAGE DIFFICULTIES

1. THE LANGUAGE PROBLEMS

Rudolph R. Schlesinger, et al., Comparative Law, Cases, Text, Materials (5th ed. 1988). © 1988 by the Foundation Press, Inc. (pages 868-875, 880-890)

Fritz Moses, International Legal Practice, 4 Fordham L.Rev. 244, 248-51 (1935). [Original footnotes omitted.]

"Words are very rascals," says Shakespeare's Clown in "Twelfth Night." . . . The flavor of a sentence is apt to change or disappear in a translation; and just this flavor may change the aspect of the case.

The consequences of these difficulties can be seen in many instances .

The German, French and Italian texts of the most carefully prepared Swiss Civil Code are equally authoritative. Yet various discrepancies between the three texts have crept in and courts have had to decide for the one or the other version....

The discrepancies between the English and French texts of the Treaty of Versailles, both “authentic” according to a provision of the Treaty, have become the subject of numerous court decisions. [As an example, Dr. Moses mentions a provision of the Treaty which in the English version speaks of “*debts*”, while the French text refers to “*dettes*.” Though linguistically of the same origin, the two terms do not have the same meaning. Debt denotes an obligation to pay a sum certain. The French term is much broader and includes any kind of obligation, whether liquidated or not. In interpreting the Treaty, English judges apparently were not even aware of the different meaning of the French text, and limited the term “debt” to claims for a sum certain. French and Belgian judges, equally without recognizing the problem, treated unliquidated claims as “*dettes*”.]^a

While the limelight of international court proceedings brings into strong relief the linguistic mistakes in international treaties, the errors made and misunderstandings arising in the daily intercourse of citizens of different nations are, of course, much more frequent.

There are treacherous words which sound almost alike in two different languages, but have a different meaning. The German word *eventuell*, for instance, does not mean *eventually*, but *perhaps*. The French *transaction* [may mean] *compromise*, while the French *compromis* means *arbitration clause*.^b Interesting are the terms for *divorce* and *separation* in the various languages. The Romans used the term *divortium* in the sense of the American term *divorce*, but in Spain and the Latin-American countries the canonical law, opposed to a dissolution of the marriage bond, was applied directly or indirectly to matters relating to marriages, and therefore the word *divorcio* was used in the sense of separation. However, reforms of the family laws have been widespread, and the meaning of the word *divorcio* now differs among these countries, in some cases even within the countries before and after the reform. In some countries it means both divorce and separation. [In a number of countries it means only separation, and in others again it refers only to divorce.] In Germany divorce is *Scheidung* and separation *Trennung*; but in Austria these same German words have just the contrary meaning: *Trennung* corresponds to divorce or *Scheidung* in Germany and

^a Multilingual texts of national laws as well as international treaties (and “uniform laws” adopted by several nations speaking different languages) frequently engender such difficulties. Many examples are discussed by H. Dolle, *Eine Vorstudie zur Erörterung der Problematik mehrsprachiger Gesetzes- und Vertragstexte*, in the volume *XXth Century Comparative and Conflicts Law—Legal Essays in Honor of Hessel E. Yntema 277* (1961) and by K. Lipstein, *Some Practical Comparative Law: The Interpretation of MultiLingual Treaties with Special Regard to the EEC Treaties*, 48 *Tul.L.Rev.* 907, 913-14 (1974).

^b Another slippery word, which in the languages and under the legal systems of the civil-law orbit sometimes has a meaning unsuspected by an English-speaking lawyer, is “director”. In a foreign country, a person whose title sounds like “director”, often is more nearly comparable to an Officer than to a director of an American corporation. See Moses, *loc. cit. supra*, at 268 9; *Societe Internationale v. Clark*, 8 languages and under the legal systems of F.R.D. 565 (D.C. 1948).

Scheidung to separation or *Trennung* in Germany;^c and recently it happened here that, due to the translation of an Austrian decree as if it had been a German decree, an Austrian, although only separated from his wife, received a marriage license in New York.

2. NOTES ON LANGUAGE

Translation difficulties are a prolific source of confusion in comparative law.

(1) Perhaps the most important terms in legal parlance are the words “law” and “right”; but a search for equivalents of these terms in foreign languages and foreign legal systems discloses considerable difficulties. In many languages, such as Latin, French, Italian, Spanish and German, there is only one word for “law” and “right” (*ius, droit, diritto, derecho, Recht*). To avoid ambiguity, legal writers sometimes use this one word solely in the sense of “right”, and employ the term denoting a code or statute (*loi, legge, Gesetz*) as synonymous with “law.” In a code jurisdiction this usage is on the whole satisfactory for the everyday work of the lawyer; but it may lead the uninitiated to the inaccurate conclusion that statutory law is the only kind of law known in those countries.^[1]

Other legal writers and courts on the continent distinguish between “subjective” *ius* (right) and “objective” *ius* (law); but in the everyday use of the word *ius*, or of its modern equivalents, civilian lawyers do not always spell out whether they have the subjective or the objective *ius* in mind. Ye comparative lawyers beware!

In dealing with languages and legal systems of non-European origin it is even more important to take nothing for granted.^[2] It seems, for instance, that in China and Japan the notion of “right” was totally unknown before the introduction of Western jurisprudence. The oriental languages, consequently, have no word expressing the notion of “right”. There seems to have been the notion of duty and obligation, but the correlativity of right and duty is something that only Westerners take for granted.^[3]

^c In 1938, after Dr. Moses’ article was written, Austria adopted the German terminology. See 2A Bergmann, *Internationales Ehe- und Kindschaftsrecht*, pp. (Oes terreich) 32-49 (1966). But the point raised in the text still has practical significance with respect to pre-1938 decrees.

^[1] In order to negative this conclusion the German Civil Code (Art. 2 of the Introductory Law) expressly provides that throughout the Code the term “Gesetz” means “any legal norm.”

^[2] See J. Frank, *Civil Law Influences on the Common Law*, 104 U.Pa.L.Rev. 887 918-19 (1956).

^[3] See Hozumi Nobushige, *The New Japanese Civil Code as Material for the Study of Comparative Jurisprudence* (Tokyo, 1912), quoted in Blakemore, *Post-War Developments in Japanese Law*, [1947] *Wis.L.Rev.* 631, 649, F. A. Narcisi, *Special Considerations in Advising and Dealing with Foreign Businessmen and Attorneys* in D. M. Evans et al. (Eds.), *Current Legal Aspects of Foreign Investment in the United States* 4, 10-11 (1976).

Similar observations have been made by Professor Macneil with respect to East African law:

“The essence of customary law may be that even litigation is essentially a negotiating process, the goal of which is the wise pacifying of both parties rather than the effectuating of ‘rights’ of an injured party. The aim would therefore be to provide a satisfactory framework for future relations whether or not the ‘command’ of the judge conforms to prior notions (if any) of general rules. And it may follow that there is a large and essential element of ‘unknowability’ about customary law and that an attempt to make it known in the sense that noncustomary law is known, is to change its character quite radically.”^[4]

To speak of “law” and “rights” in reference to such a system of customs, surely involves the danger of inaccuracy; yet, to explain the substance of the customary “law” without ever using those words, may be difficult for one trained primarily in the common law or the civil law.

(2) The use of translations, especially Code translations, without resort to the original text, will not always lead to accurate and reliable results. There is one instance in which a reputable translator reversed the meaning of a Code provision by substituting the word “less” for the word “more”.^[4a] Other illustrations of the maxim of caveat lector exist, unfortunately, in abundant numbers.^[5] The [example illustrated in table I above] is taken from the Translation of the Swiss Civil Code by Robert P. Shick (Boston 1915), a translation which according to its title page was “corrected and revised” by Professor Eugen Huber, the famous draftsman of the Swiss Code, and which was published as an “Official Publication of the Comparative Law Bureau of the American Bar Association.”

In a recent study by Hyung I. Kim, *Fundamental Legal Concepts of China and the West* 91-96, 118-121 (1981), an attempt is made to show that the notion of “right” was not totally absent from traditional Chinese thinking, even though there was no single word expressing the notion. But the author admits that “right” is not a primary and independent concept for the Chinese; to the extent that it is possible at all to speak of an individual’s entitlements, they must be thought of as flowing, in complex and somewhat artificial ways from the socially conditioned duties of others. Thus the primary concept always remains that of duty, and there is no correlativity, in the Western sense, between “right” and “duty” as two independent and equally fundamental notions.

^[4] I. R. Macneil, *Research in East African Law*, 3 EALJ 47, 67 (1967). See also R. E. S. Tanner, *The Codification of Customary Law in Tanzania*, 2 EALJ 105 (1966). This point is, of course, connected with some of the observations previously made in that part of the course in which we attempted to classify and survey legal systems.

^[4a] See the third edition of this book, at P. 399.

^[5] See e.g., Capistrano, *Mistakes and Inaccuracies in Fisher’s Translation of the Spanish Civil Code*, 9 Philippine L.J. 89 et seq., 141 et seq. (1929).

TABLE I

ORIGINAL GERMAN TEXT	ORIGINAL FRENCH TEXT	TRANSLATION BY SHICK (Italics added)	CORRECT TRANSLATION
Artikel 11 Rechtsfaehig ist jedermann. Fuer alle Menschen besteht demgemaess in den Schranken der Rechtsordnung die gleiche Faehigkeit, Rechte und Pflichten zu haben.	Article 11 Toute personne jouit des droits civils. En conséquence, chacun a, dans les limites de la loi, une aptitude égale de devenir sujet de droits et d'obligations.	Article 11 Every man is capable of rights. For all men, therefore within the bounds of the law's regulation, the same capacity exists to have rights and duties.	Article 11 Every person is capable of having rights. For all persons, therefore, within the bounds of the law's regulation, the same capacity exists to have rights and duties.
Artikel 12 Wer handlungsfahig ist, hat die Fahigkeit, durch seine Handlungen Rechte und Pflichten zu begruenden.	Article 12 Quiconque a l'exercice des droits civils, est capable d'acquérir et de s'obliger.	Article 12 He who has <i>commercial capacity</i> has the capacity by his acts to establish rights and duties.	Article 12 Whoever is <i>capable of exercising rights</i> , is capable by his acts to create rights and duties.
Artikel 13 Die Handlungsfahigkeit besitzt, wer muendig und urteilsfahig ist.	Article 13 Toute personne majeure et capable de discernement a l'exercice des droits civils.	Article 13 He possesses <i>commercial capacity</i> who is of age and capable of judgment.	Article 13 Every person who is of age and capable of judgment is <i>capable of exercising rights</i> .

The Swiss Code, like most civil-law codes, distinguishes between the capacity to have rights (Art. 11) and the capacity to exercise rights (Arts. 12, 13). "Handlungsfahigkeit", i.e. the capacity to exercise rights, is a term of art. It is defined in Art. 12. The next-following Article establishes the two legal requirements which a person must meet in order to be regarded as "handlungsfahig."

The German noun "Handlung" means "act". The German word "Handel" means "commerce". Literally, therefore, Handlungsfahigkeit is capacity to act, and Handelsfahigkeit (a word which is not actually in use) would be commercial capacity. In the 1915 translation the two were confused, although the French text should make it clear even to one not too familiar with the German language that Arts. 12 and 13 have nothing whatever to do with commerce, commercial law or "commercial capacity".^[6]

In choosing the foregoing example, the authors of this book did not intend to be critical of Mr. Shick and his associates, who showed vision and skill in tackling a task of supreme difficulty. What the student should constantly keep in mind is that *every* translation (including those by the authors of this book) is at best a second-rate tool.^[7]

^[6] According to Art. 116 of the Swiss Federal Constitution, the "national languages" are German, French, Italian and Romansch. The first three of these are also "official languages" (Amtssprachen) of the Confederation. It follows that the French (or Italian) text of the Civil Code is as "official" as the German text, even though Professor Huber's original draft was in German. 1 Egger, Kommentar zum Schweizerischen Zivilgesetzbuch, pp. 29-30 (1930).

^[7] See P. W. Schroth, Legal Translation, in J. N. Hazard & W. J. Wagner (Eds.), Law in the U.S.A. Faces Social and Scientific Change, 34 Am.J.Comp.L. (Supplement) 47 (1986).

A translation may be good enough for one purpose, and not sufficiently accurate for another. Where the decision of a case hinges on the precise meaning of language used in a foreign statute or code, it may be necessary for the translator to go through at least two stages of reasoning, by first establishing the literal, non-technical meaning of each term, and then showing a different technical meaning as evidenced by cases, commentaries, textbooks or any other embodiments of foreign law. Most of the older bilingual law dictionaries do not go much beyond the first stage. Among those published during the last few decades, however, there are several which not only *translate* but *explain* legal terms, and thus constitute more useful tools.^[8]

3. DIFFERENCES IN CLASSIFICATION

The difficult problem of “classification”, “qualification” or “characterization” in conflict of laws situations must be left to the books and courses on Conflict of Laws.^[1] In this book, “classification” will not be viewed in the technical (Conflict of Laws) sense of the word. The term is here used more generally to denote situations, constantly arising in international legal practice, where danger of misunderstanding and absurdity arises from the fact that courts and legislators, when they formulate rules in terms of their own legal language, fail to indicate whether and how these terms can be applied to foreign institutions and phenomena.

4. THE TERM “NOTARY”

(1) We have observed the striking differences in education and status between a continental notary and a notary in this country (see supra pp. 18-20). These differences have given rise to a problem of classification. Professor Nussbaum, in his book on German Private International Law (1932), page 95, long ago stated the problem as follows: “Insofar as German provisions require the embodiment of a jural act in a notarial record . . . , it may become doubtful to what extent a foreign recorder is to be regarded as a ‘notary.’ This is so especially with respect to Anglo-American ‘notaries’....”

In struggling with this problem, German courts and legal writers usually start with the observation that under German Law there are two kinds of documents executed with the help of a notary: (a) “Notarially authenticated” documents. These are ordinary signed writings, with respect to which the notary

^[8] For a listing of dictionaries, see Szladits, Bibliography on Foreign and Comparative Law 30-33 (1953 and Supps.). See also *infra* pp. 895-896.

^[1] See, e.g., I E. Rabel, *The Conflict of Laws—A Comparative Study* 52-72 (2d ed. prepared by U. Drobnig, 1958); Restatement, Second, Conflict of Laws § 7, and Reporter’s Note (1971), where further references will be found.

does no more than to authenticate the signature of one or several parties. (b) “Notarial Documents”, i.e., protocols of what the parties declared and transacted in the notary’s presence. A document of this latter kind is necessarily prepared and issued by the notary; as the reader knows, the notary retains the original of such a document, and issues only certified copies to the parties.

Where German law requires merely a notarially authenticated document (as, e.g., in the case of communications addressed to the Commercial Register and providing information concerning registrable facts), it is generally recognized that such authentication can be provided by an American notary public. To perform the authenticating function, does not require any legal learning, and thus it would seem that the differences between a civil-law notary and an American notary public are irrelevant so long as nothing but mere authentication of a signature is involved.

Where a true notarial document is required, however (as in the cases, among many others, of most real estate transactions and of promises to make a gift), it is the prevailing view among German courts and legal authors that a document drawn up by an American notary public does not meet this form requirement. The reason is that such a document, because of the low status of the American notary public, simply is not a “notarial document”, as that term is understood in Germany and other civil-law countries.

(2) The question discussed in the preceding paragraphs is of considerable interest to international practitioners. Their clients, owning interests in German corporations or other German assets, often have to execute documents which under German law require notarial form. As the fees of a German notary, especially in matters involving large amounts, can be very substantial, international practitioners often explore the possibility of having the transaction recorded by a non German notary.

Example: Suppose your client X Corp., a New York corporation, owns shares of Deutsche Luftverwertungs—G.m.b.H., a German limited responsibility company. X desires to assign these shares to its subsidiary, Y Corp., in such manner that the assignment will be recognized as valid in Germany. As the reader knows (supra p. 831), German law requires a notarial document for such assignment. In what form, if at all, can such assignment be effectively executed in New York? Proper analysis discloses that this question is a composite of two sub-questions:

(a) Would a German court, pursuant to German choice-of-law rules, consider the form of the assignment governed by New York law, and on that basis dispense with the requirement of a notarial protocol?^[6]

^[6] A negative answer to this controversial choice-of-law question which was left open in BGHZ 80, 76 (1981); is suggested by some leading authors. See BaumbachHueck, GmbH Gesetz, § 2, Anno. 9 (14th ed., 1985); G. Kegel, Internationales Privatrecht 280-81 (4th ed., 1977). Thus, a

(b) If the requirement is not dispensed with, can it be met by notarization in New York? Is a New York notary a “Notar” within the meaning of the German statute?

Even though New York law purports to give a New York notary public all the powers of a German “Notar”, a German court most probably would answer these questions in the negative, and would invalidate the assignment notarized in New York. Pursuant to § 17 of the Beurkundungsgesetz (Law Concerning Public Documents), a “Notar” is under a duty to advise the parties concerning the legal significance and consequences of the proposed transaction. Only a law-trained person can furnish such advice, and a New York notary public thus is unable to fill the shoes of a German “Notar”.

Some German intermediate appellate courts went further and held that even a Swiss notary, whose qualifications are similar to those of his German confreres, cannot perform the functions of a German “Notar” with respect to transactions governed by German law. The reason given for these holdings was that a Swiss notary, although he is law-trained, cannot properly advise the parties on matters of German law.^[9] These holdings of intermediate appellate courts have been overruled by a recent decision of the court of last resort, wherein it was held that a document properly executed before a Swiss notary is a “notarial document” within the meaning of a German statute requiring such form for a transaction governed by German law.^[10] The highest court emphasized, however, that it reached this result only on the ground that in training and status a Swiss notary is on a par with his German colleagues. The court thus confirmed the above-stated conclusion that an American notary public, who lacks equivalent training and status, is not a “Notar” within the meaning of German statutes requiring a notarial document.

D.NOTE ON THE SUBJECT OF “CORRUPTION”

The Contrast Between The Printed Word And Actual Practice (Schlesinger, et al. pages 880-890)

(1) If we speak of a legal system as “corrupt”, we usually mean that a substantial portion of governmental and especially of judicial business is disposed of in a manner which is not in accordance with the substantive and procedural rules announced in the law books.^[1] To some extent, as the “realist” school of

German court probably would hold that the formal validity of the assignment is governed by German law rather than by New York law, even though the assignment is executed in New York.

^[9] For critical discussions of these holdings see J. Kropholler, *Auslandsbeurkundungen im Gesellschaftsrecht*, 140 *Zeitschrift für Handelsrecht* 394 (1976); H. Bernstein, *Erwerb und Ruckerwerb von GmbH-Anteilen im deutsch-amerikanischen Rechtsverkehr*, id. at 414.

^[10] Decision of February 16, 1981, BGHZ 80, 76, discussed by BaumbachHueck, *supra* n. 6.

^[1] By widespread practices of evading and avoiding legal commands, the governed as well as the governing often contribute to the emasculation of the law as a regulating force in society. See, e.g.,

jurisprudence has taught us, such divergence between the printed word and actual practice can be observed in every legal system.^[1a] But there are important differences of degree, differences ranging all the way from the stifling atmosphere of a Gestapo-ridden dictatorship^[1b] to the subconscious bias or occasional indiscretion of a judge or other official from which even a decent system is not entirely safe.

(2) There are two principal channels through which, singly or in combination, corruption enters the machinery of the law: political influence and graft. The materials which follow these Notes, will deal with the more insidious forms of political corruption of legal systems.

The subject of graft might be equally interesting, but it is somewhat less susceptible of academic study. Those who are in the best position to observe this form of corruption are not inclined to publish the results of their research, and there exists as yet no Map of the World in which the various countries and areas are shaded or colored according to the degree of judicial honesty prevailing therein. Sociologists and anthropologists, however, have attempted to throw some light on the causes and patterns of graft in various parts of the world,^[2] and occasionally one can find relevant nuggets of information in legal writings, as shown by the following quotation from a recent law review article:

B. Kozolchyk, *Law and the Credit Structure in Latin America*, 7 *Va.J.Int.L.*, No. 2, p. 1, at 33-35 (1967). Although these practices may become deeply ingrained, it would seem that in most instances they have initially come into existence as a reaction of the average citizen to official abuses. It may be defensible, therefore, in exploring the root causes of "corruption" of a legal system, to place more emphasis on the conduct of the governing than on that of the governed (though the ways in which they interact, may be manifold and complex).

^[1a] In studying the divergence between law in "the books" and law in action, one must keep in mind that "the books", especially when they offer reports of actual cases, often reveal important features of the law in action. But the extent to which "the books" thus reflect reality, differs from country to country, because the types of "books" available under one system may be much more revealing than those to be found in another. See K. H. Neumayer, *Fremdes Recht aus Buchern, fremde Rechtswirklichkeit und die funktionelle Dimension in den Methoden der Rechtsvergleichung*, 34 *Rabels Z.* 411, 414-17 (1970). A student of the law in action will find that his task is relatively easier when he focuses his attention on countries where there is a great wealth of reported judicial and administrative decisions, and where the published reports of such decisions thoroughly recite the underlying facts. *Ibid.* The reader will recall that in this respect there are significant differences not only between common-law and civil-law countries, but also among the latter. See *supra* pp. 649-650.

^[1b] Human rights violations usually involve governmental deviations from the "law" stated in the local law books. For an enlightening world-wide survey of such violations and deviations, see the European Parliament's Regulation of May 17, 1983, entitled "Human Rights in the World" and "Human Rights in the Soviet Union", and accompanying Reports, all conveniently reproduced in 4 *Human Rights Law Journal* 1-127 (1983).

^[2] 2. See, e.g., the interesting study by S. Ottenberg, *Local Government and Law in Southern Nigeria*, in D. C. Buxbaum (Ed.), *Traditional and Modern Legal Institutions in Asia and Africa* 26 ff. (1967), where further references, not limited to African law, can be found.

A recent empirical study of Rio de Janeiro lawyers found that 80% of those interviewed customarily made grease payments to the clerks.... In some states, payment of both “speed money” and “delay money” is common. Payments to make the entire file disappear are not infrequent in some areas.^[2a]

International practitioners have a fairly accurate notion, based on experience and gossip, in what countries they can expect an impartial determination of litigated issues. They will try to avoid litigation in the courts of certain geographic areas, because they are almost intuitively aware of conditions such as these:

. . . judges, police chiefs, and other local officials in Latin America are notoriously underpaid and provided with inadequate working facilities; judges in smaller cities are usually isolated from each other for months or years at a time—there are no annual conferences or conventions; and finally, their tenure may well depend on maintaining their local political contacts and friendships. Not surprisingly, then, while adequate social and economic legislation (such as labor and water laws) is not difficult to find in Latin America, in many cases it is ignored, inefficiently enforced, or implemented in a manner that unduly favors a given element of society.^[3]

Experienced practitioners are aware, also, of the complexity of the “corruption” issue, especially in reference to developing countries. “Of course in many traditional societies the use of public office or authority for private advantage and gain was often expected and in part sanctioned. The officials of the traditional Chinese bureaucracy were permitted to retain a portion of the taxes they collected, and clerks and runners were permitted numerous ‘customary’ fees.”^[4] When modern Western political and legal institutions and standards are imposed on traditional peasant and pre-literate societies, such traditional customs turn into “corruption”.^[5]

As the reader will recall (see *supra* p. 30), the U.S. Congress has attempted to deal with this world-wide phenomenon by enacting the Foreign Corrupt

^[2a] K. S. Rosenn, *Civil Procedure in Brazil*, 34 *Am.J.Comp.L.* 487, at 518 (n. 205) (1986). See also the same author’s prior article, *Brazil’s Legal Culture: The Jeito Revisited*, 1 *Fla.Int.L.J.* 1, 36 (1984).

^[3] J. R. Thome, *The Process of Land Reform in Latin America*, 1968 *Wis.L.Rev.* 9, at 20-21.

^[4] 4. D. C. Buxbaum, *Introduction*, *op. cit. supra* n. 2, at 3. See also F. G. Dawson & I. L. Head, *International Tribunals, National Courts and the Rights of Aliens* 106 (1971) (referring to Spanish colonial policy “whereby minor officials, after purchasing their offices, were to receive their remuneration in fees from the public they were serving”).

^[5] 5. See Buxbaum, *supra* n. 4. For another interesting and ambitious attempt to explain the prevalence of “corruption” in developing countries, see C. Clapham, *Third World Politics—An Introduction* 5054 (1985)

Practices Act of 1977.^[6] In unilaterally mounting this indiscriminate, global attack on “corruption”, our lawmakers were too provincial to realize that in countries where (either de jure or de facto) governmental powers can be arbitrarily exercised, the “questionable payment” may be the only remedy by which a victim threatened with arbitrary government action can protect his interests.^[7] In certain legal systems, such payments thus may serve purposes functionally comparable to what in our system might be accomplished by judicial and other legal remedies.^[8]

With its undertone of moral reprobation, “corruption” is an emotive word. We should be cautious in its use when we discuss the—to us—strange conditions of traditional societies in the early stages of modernization.^[9] There may be less need, however, to be restrained in making value judgments when we turn—as we now do—to the problem of political perversion of highly developed legal systems.

^[6] 6. 91 Stat. 1494. See N. H. Jacoby, P. Nehemekis & R. Eells, Bribery and Extortion in World Business (1978), T. Atkeson The Foreign Corrupt Practices Act of 1977 12 Int. Lawyer 703 (1978); Note, Questionable Payments by Foreign Subsidiaries: The Extraterritorial Jurisdictional Effect of the Foreign Corrupt Practices Act of 1977, 3 Hastings Int. & Comp.L.Rev. 151 (1979).

It is interesting to compare the Foreign Corrupt Practices Act with the more intelligent European approaches to the problem. See, e.g., R. J. Goebel, Professional Responsibility Issues in International Law Practice, 29 Am.J.Comp.L. 1, 28 ff. (1981); M. Bogdan, International Trade and the New Swedish Provisions on Corruption, 27 Am.J.Comp.L. 665 (1979); W. Fikentscher & K. Waibl, Ersatz im Ausland gezahlter Bestechungsgelder, 7 IPRax 86 (1987).

^[7] See G. T. McLaughlin, The Criminalization of Questionable Foreign Payments by Corporations: A Comparative Legal Systems Analysis, 46 Ford.L.Rev. 1071, especially at 1095 (1978).

^[8] See *ibid.*

^[9] Legal institutions transplanted from a Western legal system to a non-Western environment often function in ways that appear anomalous to the Western observer. In instances of this kind it is important not to use the word “corruption” when in reality we deal with a transformation caused by cultural differences. The institution of the jury furnishes an apt illustration. In our view, that institution can function only if the jurors are able to exercise independent judgment, basing their decisions exclusively (or at least principally) on the evidence and on the court’s instructions. If in a given culture the tribal or family ties of the jurors are so strong as to make the exercise of such independent judgment impossible, then trial by jury “would be impractical and anomalous.” King v. Morton, 520 F.2d 1140 (D.C.Cir. 1975) (holding that factual findings on cultural conditions are necessary before it can be determined whether jury trials in American Samoa are feasible). See also the same case upon remand to the District Court, King v. Andrus, 452 F.Supp. 11 (D.D.C. 1977). See also *supra* pp. 332-335.

E. LAW IN ACTION

1. IN GENERAL

[From the Schlesinger Casebook]

(a) The actual working of a legal and political system can be understood only if the system is viewed as a whole. Even though the case at hand seemingly may involve no more than a narrow issue of foreign substantive law, a proper evaluation of the relevant foreign sources always requires an awareness of the actualities of the legislative and judicial process in the particular country. In the many situations, moreover, in which a case turns on the validity and effect of a judicial or other official act of a foreign government (e.g., a criminal conviction^[1]), the true significance of the particular act to be evaluated may well escape a person who is not familiar with the over-all functioning of the system.

(b) Law in the books and law in action are not neatly separated compartments. A knowledgeable expert frequently will be able to find, in the law books themselves, striking indications of the actual corruption of a legal system. For example, Professor Kirchheimer's findings—relied upon by the court in the principal case—concerning the absence of judicial independence in East Germany were based, in large part, on statutory provisions and official pronouncements of communist functionaries in East Germany.^[2]

Occasionally, special evidentiary difficulties may be encountered in instances where country X has deliberately attempted to conceal the realities of its law in action.^[2a] The most reprehensible techniques of totalitarian governments, especially torture and other methods of terror, usually are practiced in secret. Some of the policies of such governments, moreover, may be so complex and shifting that even experts are unable to find tell-tale traces in published materials. In such a case, some courts may be willing, by way of judicial notice, to draw broad

^[1] For further examples see *infra*.

^[2] The techniques which at the time in question were used in East Germany for the abrogation of judicial independence, were not fundamentally different from those applied by the predecessor (Nazi) regime. Concerning the latter, see *Estate of Leefers*, 127 Cal.App.2d 550, 274 P.2d 239 (1954); *In re Krachler's Estate*, 199 Or. 448, 263 P.2d 769 (1953); N. S. Marsh, *Some Aspects of the German Legal System under National Socialism*, 62 L.Q.Rev. 366 (1946). On the general problem of corruption of the legal order by fascist regimes, see A. H. Campbell, *Fascism and Legality*, 62 L.Q.Rev. 141 (1946).

^[2a] Even "laws" in the formal sense of the word sometimes are kept secret in communist countries. See H. J. Berman and P. B. Maggs, *Disarmament Inspection Under Soviet Law* 12-13 (1967).

inferences from what is known of the general governmental system of X.^[3] That failing, it becomes necessary to present evidence, or at least materials for judicial notice, concerning the specific practices in question. This may call for testimony by expert witnesses who have lived in X in the not-too-distant past, or otherwise have the requisite knowledge of actual conditions there.^[4]

(2) *Limitations on the Courts' Power to Consider a Foreign Country's Law in Action.* Actual practices, as distinguished from book law, of foreign nations have been considered by American courts with particular frequency in cases arising under state statutes which regulate or limit the inheritance of property by non-resident aliens.^[5] Some of these statutes are intended to be protective; they direct that so long as the non-resident alien heir, under the law of his own country, could not freely receive and enjoy the proceeds of his inheritance, such proceeds be kept for him in official custody here;^[6] should he come to this country at a later time, his share will be paid over to him. Other statutes, in force in a dwindling number of states, provide for escheat of the non-resident alien's inheritance unless his country grants reciprocal inheritance rights to U.S. citizens. In order to determine the reciprocity issue arising under statutes of the latter type, state courts in many decisions explored the question whether *as a matter of law in action as well as book law* U.S. citizens would be able to inherit, and as heirs to receive, property situated in a particular foreign country. In *Zschernig v. Miller*, 389 U.S. 429, 88 S.Ct. 664 (1968), the U.S. Supreme Court disapproved these decisions. The Court reaffirmed an earlier holding^[7] to the effect that such a reciprocity statute, on its face, is not necessarily unconstitutional; but the majority of the Court laid down the novel rule that in applying the reciprocity test, a state court may

^[3] See *In re Volencki's Estate*, 35 N.J. Super. 351, 114 A.2d 26 (1955), and other cases cited by Heyman, *The Nonresident Alien's Right to Succession Under the "Iron Curtain Rule"*, 52 N.W.U.L.Rev. 221 233-4 (1957).

Problems of this kind arise very often in deportation proceedings. By statute, the Attorney General is directed not to deport or return an alien to a particular country "if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion". 8 U.S.C.A. § 1253(h), as amended. The exceedingly numerous cases in which this provision has been invoked, are discussed in *IA Gordon & Rosenfield, Immigration Law and Procedure*, § 5.16b (Rev. Ed., 1986, and Cum. Supp.).

^[4] See *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F.Supp. 1337, 1342-43 (S.D.N.Y. 1982), *aff'd* 727 F.2d 274 (2d Cir. 1984); *In re Wells' Estate*, 204 Misc. 975, 126 N.Y.S.2d 441 (Surr.Ct.N.Y.Co., 1953). See also *Gordon & Rosenfield*, *supra* n. 3.

^[5] For surveys of such statutes, see R. Solkin, *United States, in the comparative study by D. Campbell (Ed.), Legal Aspects of Alien Acquisition of Real Property* 153, at 167-85 (1980), W. C. Snouffer, *Nonresident Alien Inheritance Statutes and Foreign Policy—A Conflict?*, 47 *Or.L.Rev.* 390, at 400 (1968). See also *Comment*, 13 *Vill. L.Rev.* 148 (1967); *Note*, 25 *Syr.L.Rev.* 597 (1974).

^[6] See *ibid.*

^[7] *Clark v. Allen*, 331 U.S. 503, 67 S.Ct. 1431 (1947).

engage in “no more than a routine reading” of the foreign inheritance statutes. According to the majority opinion written by Mr. Justice Douglas, a state court intrudes into the area of foreign relations reserved to the national Government if it finds *on the basis of a study of actual practice* that the foreign country does not grant reciprocal rights to U.S. citizens. A state court’s inquiry into a foreign country’s *law in action* would, according to Mr. Justice Douglas, embarrass the United States Government in the conduct of its foreign policy.^[8]

It is to be hoped that this unsound doctrine, which in effect puts blindfolds over the eyes of state court judges,^[8a] soon will be reconsidered, and that in any event it will not be expanded beyond the area of aliens’ inheritance rights.^[9]

2. THE REASONS FOR STUDYING LAW IN ACTION

(a) For the practicing lawyer, exploration of the law-in-action aspects of a foreign legal system becomes necessary in a variety of contexts. The litigator is not the only type of legal practitioner facing the task of such exploration. Knowledge of the actual practices as well as the book law of a foreign nation may be required, for instance, in order to determine the feasibility and reliability of treaty arrangements with that nation.^[9a] Similarly, a study of the “investment

^[8] This assertion by Mr. Justice Douglas was pure fancy. The Solicitor General of the United States, appearing as *amicus curiae* in the *Schernig* case, after consultation with the U.S. State Department emphatically stated that as a matter of experience the implementation of state reciprocity statutes (of the kind involved in that case) has had no substantial impact on the foreign relations of this country. See the opinions of Justices Douglas, Stewart and Harlan in the *Schernig* case.

^[8a] Cf. *Estate of Hajridin*, — 33 N.Y.2d 955, 353 N.Y.S.2d 731, 309 N.E.2d 131 (1974), where in a brief memorandum opinion the New York Court of Appeals politely underscored the senselessness of the *Schernig* limitation on the judicial power of state courts.

^[9] Prompted, at least in part, by the U.S. Supreme Court’s *Schernig* holding, the California Legislature in 1974 repealed the California reciprocity statute (Probate Code Section 259). See Note, *Trust & Estate Planning: The Effect of Soviet Policies on Legacies from Abroad*, 1 *Hastings Int. & Comp.L.Rev.* 195, 200-01 (1977).

Concerning the impact of the *Schernig* holding on the *protective* type of “Iron Curtain” statutes (see *supra*, text at n. 6), the reader is referred to the discussion in the Note, 25 *Syr.L.Rev.* 597, at 616-21 (1974), where further references can be found.

Qwere whether the *Schernig* doctrine applies in a case where an express provision of the testator’s Will (rather than a state statute) conditions a legacy upon the foreign legatee’s ability to obtain use, enjoyment and control of the property left to him. The question was raised (and discussed by the lower court), but ultimately left undecided in the interesting case of *Will of Danilchenko*, 64 *Misc.2d* 665, 315 N.Y.S.2d 153 (Surr. Ct., Dutchess Co., 1970), *aff’d* by a divided court, 37 *A.D.2d* 587, 323 N.Y.S.2d 150 (1971), *aff’d* without op., 30 N.Y.2d 504, 329 N.Y.S.2d 820, 280 N.E.2d 650 (1972). Cf. *Matter of Kosek*, 31 N.Y.2d 475, 341 N.Y.S.2d 593, 294 N.E.2d 1.Y8 (1973). See also Note, 1 *Hastings Int. & Comp.L.Rev.* 195, at 208-12 (1977).

^[9a] 9a Thorough and searching studies of foreign law have been undertaken for this exceedingly practical purpose. See, e.g., H. J. Berman & P. B. Maggs, *Disarmament Inspection Under Soviet*

climate” in a given country will have to include a thorough look at the social and institutional elements conditioning the certainty and enforceability of legal rights.

When we turn to litigated matters, we find that the outcome of innumerable cases has been influenced by proof of foreign law in action. The principal case furnishes an illustration. Only a few further examples can be given here:

(aa) Suppose the government of Graustark is interested in an action pending here. Witness W, a resident (and perhaps an official) of Graustark, testifies by deposition or in response to letters rogatory. His testimony is favorable to the government of Graustark. In evaluating the credibility of W, the court must examine whether under the conditions actually prevailing in Graustark, the witness, had he testified differently, would have had to fear arbitrary reprisals.^[10] The same is true if W comes here and testifies in open court, but thereafter intends to return to Graustark.^[11]

(bb) A motion for dismissal on grounds of *forum non conveniens* should be denied if the forum to which the motion seeks to relegate the plaintiff “is lacking in due process”.^[12]

In a recent case in which the allegedly more convenient forum was Iran, a federal District Court rejected defendant’s *forum non conveniens* motion, saying: “. . . I have no confidence whatsoever in the plaintiff Ps ability to obtain justice at the hands of the courts administered by Iranian mullahs. On the contrary, I consider that if the plaintiffs returned to Iran to prosecute this claim, they would probably be shot.”^[12a]

Law (1967); Z. L. Zile, R. Sharlet & L. C. Love, *The Soviet Legal System and Arms Inspection: A Case Study in Policy Implementation* (1972), reviewed by J.N. Hazard in 72 *Colum.L.Rev.* 1448s (1972) and by G. Ginsburgs in 21 *Am.J.Comp.L.* 188 (1973).

^[10] 10. Cf. *Zwack, v. Kraus Bros. & Co.*, 133 F.Supp. 929, 936-7 (S.D.N.Y. 1955), mod. on another point, and otherwise aff’d 237 F.2d 255 (2d Cir. 1956).

It has been suggested that W’s deposition should not even be taken, and that to do so would be a waste of time, if conditions in Graustark are such that the testimony of the witness is likely to be influenced by fear. The courts, however, have granted motions for the taking of depositions and the issuance of letters rogatory regardless of possible pressure upon the witness, saying that “the evaluation of evidence must wait until it is formally produced” at the trial. In *re De Lowe’s Estate*, 143 N.Y.S.2d 270 (Surr.Ct.N.Y.Co., 1955). To the same effect see *Bator v. Hungarian Commercial Bank of Pest*, 275 App.Div. 826, 90 N.Y.S.2d 35 (1st Dept. 1949); *Ecco High Frequency Corp. v. Amtorg Trading Corp.*, 196 Misc. 405, 94 N.Y.S.2d 400 (S.Ct.N.Y. Co., 1949), aff’d 276 App.Div. 827, 93 N.Y.S.2d 178 (1st Dept.; Van Voorhis, J., dissenting).

^[11] See *Matter of Draganoff*, 46 Misc.2d 167, 173, 259 N.Y.S.2d 20 (Surr.Ct.Westch. Co., 1965).

^[12] *Gantuz v. Dominican S.S. Line*, 22 Misc.2d 567, 198 N.Y.S.2d 421 (Sup.Ct. Bronx Co., 1960). To the same effect see *Constructora Ordaz, N.V. v. Orinoco Mining Co.*, 262 F.&pp. 90 (D.Del. 1966)- *Flota Maritima Browning v. The Ciudad de la Habana*, 181 F.Supp. 301 (D.Md. 1960).

^[12a] *Rasoulzadeh v. Associated Press*, 574 F.Supp. 854, at 860-61 (S.D.N.Y. 1983), aff’d 767 F.2d 908 (2d Cir. 1985). See also *Continental Grain Export Corp. v. Ministry of War—ETKA Co.*, 603 F.Supp. 724, 729 (S.D.N.Y. 1984), where it is pointed out that Iranian attorneys are unwilling to be retained by U.S. clients because of fear of persecution.

In another recent case decided by the same court,^[12b] a Bermuda corporation (CANOVER) sued a government-owned Chilean corporation (CAP) for payment of goods sold and delivered, and for repayment of a loan. CAP moved to dismiss on forum *non conveniens* grounds, arguing that the action could more conveniently be tried in Chile. In denying the motion, the court stated (at 1342-43):

. . . CANOVER has raised serious questions about the independence of the Chilean judiciary vis a vis the military junta currently in power. Having carefully considered the views of eminent experts on both sides, a significant doubt remains whether [CANOVER] could be assured of a fair trial in the Chilean courts in view of the fact that CAP is a state owned corporation. Specifically, the expressed power of the junta to amend or rescind constitutional provisions by decree impugns the continuing independence of the judiciary regardless of the fact that it appears that the constitutional provisions relating to the independence of the judiciary are currently in force. Affidavit of Henry P. DeVries, Professor of Latin American Law at Columbia University School of Law, 115, *citing* Executive Decree of September 11, 1973; Executive Decree No. 128 of November 12, 1973; Executive Decree No. 527 of June 17, 1974; Executive Decree No. 788 of December 2, 1974. There is some suggestion that the junta has in fact interceded in a pending case to request reversal of an interlocutory decision where the government was not a party. *Id.* at n. 6. While we do not hold as a matter of fact that the Chilean judiciary is not independent of the junta or that CANOVER could not possibly receive a fair trial there, the doubts raised are sufficiently serious to put the burden on CAP, the party asserting the appropriateness of the Chilean forum, to demonstrate its adequacy. Since we are unable to conclude from the differing views expressed by the experts that Chile would be an adequate forum, CAP has failed to carry its burden of persuasion that CANOVER's choice of forum should be disturbed. Accordingly, its motion to dismiss the complaint under the doctrine of forum *non conveniens* is denied.

By the same token, a contractual forum-selection clause purporting to confer exclusive jurisdiction on the courts of country X will not prevent an action in an American court if it can be shown that under the actual conditions prevailing in X the parties could not obtain a fair trial in the courts of X. It was so held, with specific reference to the post-revolutionary "Islamic courts" in Iran, in a number of recent cases.^[12c]

(cc) The judgment of a foreign court will not be recognized or enforced here unless it was rendered "upon regular proceedings, after due citation or

^[12b] Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A., 528 F.Supp. 1337 (S.D.N.Y. 1982), *aff'd* 727 F.2d 274 (2d Cir. 1984).

^[12c] 12c. See, e.g., McDonnell Douglas Corp. v. Islamic Republic of Iran, 757 F.2d 341, at 345-46 (8th Cir. 1985), where numerous other cases to the same effect are cited. See also *supra* n. 12a. But note that where an exclusive forum-selection clause is involved, the burden of proof may be on the party contending that the contractually chosen forum is inadequate.

voluntary appearance . . . , and under a system of jurisprudence likely to secure an impartial administration of justice. . . .”^[13] Whether the foreign court was “impartial”, and whether its proceedings were “regular”, can be determined only after examining the realities as well as the rules of its procedure.^[14] This should be kept in mind, in particular, when the question arises whether effect should be given to foreign criminal judgments. Suppose D, a refugee from Graustark, was convicted of some offenses by a Graustark court.^[15] Is this a “conviction” which under our immigration laws forever bars D from entering the United States?^[16] Is it a “conviction” within the meaning of our recidivist statutes?^[17] Is it a “conviction” even though there is no judicial independence in Graustark, and everybody knows that the Graustark Ministry of Justice often gives telephonic instructions to criminal courts, suggesting conviction of the accused, and specifying the expected sentence?^[18] Would it be necessary to prove that such instructions were given in D’s case, or would it suffice to prove the general practice?

(b) The comparatist, even if he is not a practicing lawyer faced with questions such as those suggested above, cannot afford to ignore the realities of the

^[13] *Hilton v. Guyot*, 159 U.S. 113, 202 16 S.Ct. 139, 158 (1895). This dictum is good law even in those jurisdictions which reject the reciprocity doctrine announced in the same case. See Restatement, Second, Conflict of Laws § 98, Comment c (1971); W. L. M. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 Colum.L.Rev. 783, 795-96 (1950); C. H. Peterson, *Foreign Country Judgments and the Second Restatement of Conflict of Laws*, 72 Colum.L.Rev. 220, 249-51 (1972).

^[14] Provided the foreign judgment is regular on its face, it would seem that the burden of alleging and proving any defect of the foreign proceedings is on the party opposing recognition or enforcement of such judgment. See Peterson, *ibid*.

^[15] Perhaps the conviction was for an “economic crime”; perhaps it was for “tax evasion”, the tax law being administered discriminatorily and as an instrument of the “class struggle”. See the instructive German cases reported by M. M. Schoch in 55 Am.J.Int.L. 944-97 (1961).

^[16] See R. B. Schlesinger, Comment, 2 Am.J.Comp.L. 392, 397-99 (1953), and *supra* p. 29.

^[17] Under recidivist statutes, a former felony “conviction” in a foreign country often may lead to enhanced punishment. See, e.g., California Penal Code Section 668. Of course, if the former conviction is invalid, it may not be used in sentencing. *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589 (1972). But what criteria should be employed in order to determine whether a foreign-country conviction (assuming it is valid under the law of the foreign country in question) must be treated as invalid by a court in the United States? It has been held that a foreign conviction is not necessarily invalidated by the foreign court’s failure to grant the defendant a specific right (right to counsel) to which he would have been entitled in an American court. See *Houle v. United States*, 493 F.2d 915 (5th Cir. 1974). The opinion in that case however, implicitly recognizes that the foreign conviction would have to be treated as invalid if the foreign system “has failed to provide a fair trial” (*id.* at 916). See also *supra* p. 29. In determining whether the foreign conviction was based on a fair trial, the sentencing court will have to look at the foreign country’s entire criminal process as it affected the defendant; actual practice as well as the law in the books will have to be considered.

^[18] See the principal case, and the article by Professor Kirchheimer cited by the court. Cf. Marsh, *supra* n. 2, at 374; International Commission of Jurists, “Justice Enslaved”, *A Collection of Documents on the Abuse of Justice for Political Ends*, pp. 126 ff. (1955).

world in which he lives. Whatever his purpose in studying foreign institutions, he deceives himself if he limits his task to what Dean Wigmore called “the barren dissection of verbal texts”.^[19] This danger of self-deception is acute. Like many of the other pitfalls in comparative law, it stems from the indiscriminate use of domestic experience in dealing with foreign problems. In his own habitat, every experienced lawyer is a “practicing anthropologist”, to use an expression coined by the late Jerome Frank. By living and practicing in his community, he becomes intuitively aware of the way in which legal institutions actually work;^[20] but when he tries to penetrate into a foreign system, he has no such intuition or experience to guide him.

Once a student of comparative law recognizes this handicap, he is well on his way to overcome it. In the light of such recognition, he will be able more realistically to define his projects, to ask more searching questions and to become more critical in evaluating the sources from which valid answers can be obtained. Healthy skepticism thus may help to forge a sharpened tool for inquiry, a tool which in a limited area of human endeavor may be of some value in reducing man’s ignorance of man.

^[19] Wigmore, *More Jottings on Comparative Legal Ideas and Institutions*, 6 *Tulane L.Rev.* 244, 263 (1932).

^[20] For example, in those American jurisdictions which still adhere to the contributory negligence rule, no local lawyer will be misled by the book-learning concerning that rule. He knows that juries do not always take such learning seriously.

Chapter 5

LEGAL EDUCATION IN THE CIVIL LAW WORLD

A. INTRODUCTORY NOTE

This is the first of two chapters designed to use the students' experience in a detailed comparative legal exercise. In reviewing this material, I tell the students that I choose legal education for an initial extended comparison because they are all very familiar with their own legal education. Therefore, they can identify the strengths and limitations of the general statements made in the readings about our own system. This will help them to understand that legal generalizations are often difficult and wrong, but they can also be largely accurate and helpful to the comparativist, provided we are aware of their limitations.

I especially emphasize that legal education outside of the United States is fundamentally an undergraduate degree. Indeed, in Spain and in most of the Americas, a basic law degree and membership in the local *Colegio de Abogados* (the unified bar association)¹²⁵ are the usual path to private law practice. However, there are many specialized professions in the Civil Law Tradition —notaries, prosecutors and administrative officials and judges, for example— that require specialized education and have specific requirements for admission. Additionally, in countries like France and Germany, there are specialized graduate schools or curricula for these professions, and this has an important effect on legal culture and performance. For example, historically, most of the members of the Constitutional Council of France are former students or graduates of the *Ecole Nationale D'Administration* (known by its initials as the ENA)¹²⁶ or one of the *Instituts D'Etudes Politiques* (the Institutes for Political Studies),¹²⁷ which train members of the high bureaucracy and government officials, and relatively few

¹²⁵ Spain, for example, has multiple local and regional *Colegios*, organized under the umbrella of the national *Consejo General de la Abogacía Española* (National Council of the Spanish Bar). See <http://www.cgae.es/> (last visited April 13, 2010).

¹²⁶ <http://www.ena.fr/> (last visited April 13, 2010).

¹²⁷ There are nine such institutes throughout France, organized under the umbrella of the *Science Politiques, or SciencePo* structure, which is composed by the National Foundation for Political Science of France and the Paris Institute for Political Studies. <http://www.sciences-po.fr/portail/> (main page) and <http://www.sciences-po.fr/portail/fr-fr/decouvrir-sciences-po/les-gouvernements-de-sciences-po/> (organizational structure page) (last visited April 13, 2010). For information in English, see <http://admissions.sciences-po.fr/> (last visited April 13, 2010).

have experience as ordinary judges or magistrates. This in turn affects the culture of the Council and its operations.¹²⁸

I contrast the long and specialized nature of European law study, with the professional and liberal tradition of law studies in the United States. A U.S. law graduate is able, and even expected to work in different legal disciplines throughout her career. The typical European student will have to make a more specific commitment to a particular professional specialty earlier, and will be required to study and work according to this choice. Over the past few years, I have been lucky to have a number of foreign students in my classroom, and this has allowed me to engage the students in a dialog about the very different expectations of legal education that predominate on either side of the Atlantic or Pacific, and from North to South in the Americas.

This chapter always generates very lively discussion about legal education that I then turn into an in-depth case-study on comparative methodology. I spend most of the time purposely trying to get students to think about the disagreements that they might have with some general statements used in describing the U.S. system such as “meritocratic” admissions, “small” class size, “high-expectations” of students, “interactive” classroom teaching. In addition to finding it unbearably amusing, I have a pedagogical purpose for this discussion: it really teaches them to understand the strengths and limitations of general descriptions of a particular system because they have an experienced frame of reference from which to evaluate the information that they have read. Because I have served on the Membership Review Committee of the Association of American Law Schools, I am also able to explain how accrediting and membership organizations for law schools in the United States have an important effect on legal education in this country.¹²⁹ The challenge in this chapter will be to update the readings to account for major changes in legal education, especially in Europe under the guidance of the Union, and in important places such as Japan, which overhauled its system in 2004.¹³⁰ But the basic pedagogical value of the discussion should remain strong.

¹²⁸ For the current composition, and links to their basic biographies, see <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/the-members/the-members.25737.html> (last visited April 12, 2010).

¹²⁹ The AALS is a voluntary membership organization that groups most law schools in the United States. The requirements of membership have an important effect on how the law schools are organized and managed. See generally <http://www.aals.org> (last visited April 14, 2010). The Membership Review Committee “examines law school applications for membership in the Association and sabbatical evaluation reports of member law schools[; and] makes recommendations to the Executive Committee on the actions it should take.”

¹³⁰ See generally James R. Maxeiner, Keiichi Yamanaka, *The New Japanese Law Schools: Putting The Professional Into Legal Education*, 13 PACIFIC RIM L. & POLICY J. 303 (2004); Norbert Reich, *Recent Trends In European Legal Education: The Place Of The European Law Faculties Association*, 21 PENN. STATE INT’L LAW REV. 21 (Fall 2002) (discusses the “Bologna process” of reforming legal education in Europe).

B.LEGAL EDUCATION THERE AND HERE

John Henry Merryman, *Legal Education There And Here: A Comparison*, 27 *STANFORD LAW REVIEW* 859, 861-66, 868-71, 874-76 (1975).

1.HIGHER EDUCATION: THREE FUNDAMENTAL DIFFERENCES

There are certain fundamental differences between the systems of higher education in the United States and those in most civil law countries, and these differences strongly affect the two systems of legal education. I will discuss [two] such fundamental differences, the first of which might be summed up in the terms “democracy” and “meritocracy.” In a sense this first difference results from two major inconsistent forces in higher education: on the one hand there is a desire to make higher education available to everyone without distinction; on the other there is the desire to make the university a place in which academic merit is recognized and rewarded. One ideal leads to the conception of the mass university; the other to the university in which admission and advancement are controlled on the basis of academic aptitude and performance. It is my observation that universities in the civil law world lean in the democratic direction, while meritocracy is the dominant ideal in American universities. This is not to say that merit is totally ignored or devalued in the civil law world, nor that American universities ignore democratic considerations; it is only to suggest a significant difference in emphasis.

Thus, the Faculty of Law at the University of Rome has [in 1980 21,500] students, while the Stanford Law School has a student body of 450. The difference arises in part from the power of American law schools to exclude applicants on the basis of merit.... It is common for students to apply to several law schools, since they have no certainty of being accepted at any of them. Because of the competition among law schools for the best students, and the desire of the best students to go to the more eminent schools, a student who is denied admission at Harvard or Yale or Stanford may be admitted to some less highly regarded school. Thus, there is a tendency for the academic quality of student bodies to be stratified according to the national reputations of the schools. The cycle is, to some extent, self-perpetuating, since one of the important factors in the reputation of a law school is the quality of its student body. Thus, although there is likely to be a place in some law school for almost any student, the best students go to the best schools and get the best legal education and move more easily into the best careers.

The situation in many civil law universities is entirely different. There anyone who has completed certain formal prerequisites and has survived a certain number of years of prior education is automatically admitted to the university and to the faculty of law. In the post-World War II period of mounting affluence, rising expectations, the extension of public primary and secondary education to greater

numbers of people, and the greater democratization of society in such nations, the old economic and social barriers to university education lost much of their effectiveness. Suddenly, great floods of students descended on universities with inadequate numbers of faculty and inadequate libraries, classrooms, and other physical facilities. This phenomenon provides a partial explanation of the student upheavals in Paris and other parts of Europe in 1968: too few universities with too few resources submerged by thousands of students. An adequate explanation of the situation of students in civil law universities would be extremely complex, but as this example shows, the democratic principle—the notion that the student is, at a certain stage of his education, entitled as of right to admission to the university—is an important component of it....

A second distinguishing feature of higher education in the civil law world is the minor role played by private universities. Indeed, in most civil law nations private universities do not exist. Instead, universities are maintained and are subject to control by the state, usually through the same ministry that has the responsibility for public elementary and secondary education. In the United States, on the contrary, both private and public universities compete with each other for faculty and students, as well as for gifts and grants from individuals, corporations, foundations, and government sources. In this competition, the private universities occupy a position of leadership and have done so throughout the history of the nation. There are excellent and influential public universities, but as a general proposition the private universities set the standard for higher education.

Because the private university is not subject to anything but the most limited form of governmental supervision, it has more freedom to experiment, to innovate, and in general to progress.... Since the major private universities provide the leadership for all of higher education, the other universities, including the public ones, tend to emulate them. Any attempt to establish rigid control over the policies, faculty, curricula, and operations of public universities is met with the objection that such controls will put them at a disadvantage in the competition with private universities and lead in the end to deterioration of the public university. In this way, the autonomy of the private university helps to maintain the autonomy of the public university....

In a number of civil law nations none but the most trivial reforms seems to be possible without ministerial, and sometimes legislative, action at the highest levels. Uniformity is the rule, so that policies adopted for one university extend to all. The notion of the dynamic university, constantly experimenting and progressing, does not exist. Nor does the notion of academic competition among universities, with each striving for leadership, for the best faculty and students, and for the most distinguished scholarship. Instead, one finds a relatively static and standardized university system....

2. THE GOALS OF LEGAL EDUCATION

The objectives of legal education in the two systems are vastly different. This can be shown through a few generalizations that oversimplify but may be sufficiently instructive to justify the risk. First, legal education in the civil law world is, at bottom, general education, not professional education. It is true that many civil law faculties include some instruction of a technical or professional nature, but courses of this kind typically are recent minor additions to a corpus that is fundamentally liberal in character and outlook. It is not anticipated that all, or even most, of those who attend the faculty of law will become advocates or judges or notaries. Law is merely one of the curricula available to undergraduate students.

This is one reason why legal education in civil law universities seems to us to be comparatively “nonprofessional” or “nontechnical.” Any movement in the direction of technical or professional education is a movement away from the paradigm. Thus, instruction in civil law faculties is more abstract, more concerned with questions of philosophic than immediate practical importance, more removed from the solution of social problems. University legal education in England shares these characteristics; in this respect it is more like the legal education in the typical European or Latin American university than that in most American law schools. In England and on the Continent the professional side is taken care of after the university: in the *Referendarzeit*, or in apprenticeship with a solicitor, advocate, or notary, or in special advanced professional schools for administrators or judges.

In the United States, legal education is primarily professional education, with some admixture of nonprofessional elements. In part this difference is structural: here legal education is *graduate* education, something undertaken *after* completion of the undergraduate degree requirement. Law is not regularly taught in the university as a liberal or humane subject, or as a social science. One obvious disadvantage of such a system is that the great mass of undergraduates leave the university without any organized exposure to the legal system. Virtually no courses are available for the student who wishes to learn about the legal system, but does not want to spend the additional years in law school....

3. PROFESSORS

One can also sharply contrast the role played by the law professor. The law professor in the United States generally spends his working time at the law school, in the classroom and in his office. His office there is his study; that is where he does his writing, prepares for class, and meets with students and colleagues. His presence there makes him more available to students and encourages faculty-student contact outside of class. The number of faculty, when compared to the number of students, produces a ratio that encourages small classes and a more

personal relationship between professor and student than in the civil law counterpart.

The contrast with law faculties in civil law nations is striking. In most of them (Germany is a major exception), the concept of a full-time professor is relatively unfamiliar. The professor comes to the law school to deliver his lecture and leaves when it is finished. Outside of his actual time in class he is seldom seen at the school and he is not expected to be there. Confronted by an enormous number of students, it is almost impossible for the professor to become familiar with them, even if he had the time and the inclination. At the end of the class, both he and the student leave the university.

The American professor's continual presence at the law school deeply affects collegial life. It is easy to find a colleague to talk to about an interesting problem or to get an authoritative reaction to an idea. The situation permits spontaneity and informality, encourages collaboration in teaching and research, and offers easy accessibility to a wide range of interests and expertise. The result is a natural tendency toward "horizontal" or collegial scholarly and personal relationships that is lacking in many civil law universities. There one more typically finds a hierarchical or vertical pattern. At the top is the professor who occupies the chair. Arrayed beneath him are junior colleagues, assistants, and researchers. Communication habitually runs vertically within the *cathedra*.

The full-time nature of law teaching in America tends to produce a substantial number of professors who maintain little, if any, direct contact with the practice of law. In most civil law jurisdictions, however, professors carry on law practice or engage in other careers; teaching is viewed as an accessory activity. Stipends reflect this difference: in the United States law professors are paid enough to support themselves without the necessity for additional income. But in Chile and Italy, for example, the pay for university law teaching is low because it is anticipated that the professor will devote a major portion of his time to law practice or some other remunerative career. Indeed, in some civil law nations the position of professor in the faculty of law is more important for the prestige (and the additional business) it provides than for the professional stipend.

The organization of civil and common law law schools is another area of substantial difference. The typical civil law university is composed of a group of "faculties." Each faculty, in turn, is a collection of "chairs" or "*cathedra*" occupied by senior professors. Occupancy of a *cathedra* in a law faculty carries with it the direction of an institute, with its own budget, staff rooms and library, and the right to a certain number of younger assistants interested in academic careers. The assistants help the professor in his teaching and research. Where the professor maintains an active professional practice, his academic assistants are also likely to be his junior law associates. If he is engaged in a political career, his academic assistants will be part of his political staff. The professor is expected to promote the interests of his assistants, particularly to assist them in their academic careers. This system makes the senior professor lord of a substantial domain and

gives him great power over the lives of his assistants and his staff. Indeed it is common to speak of the professor as a “baron” and to complain (if one is an impatient young scholar with unfulfilled academic aspirations) of the “baronial system.”...

4.CURRICULA AND TEACHING METHODS

The curricula of American law schools typically include a few prescribed courses and a large number of electives covering a broad range of subject matters. By comparison, the curricula at civil law universities tend to be much more limited, both in the number and in the scope of courses offered, and to include few electives. In part this difference may follow from the fact that the civil law faculty is less oriented toward professional training, and therefore less concerned with providing opportunities to study the nuances of various professional specializations. Another possible explanation is the greater freedom of American law schools to innovate and to experiment, unrestricted by an official policy of conformity or by the necessity for prior governmental approval of proposed reforms. Still another reason might be that the culture of the civil law takes a narrower, more restricted view of the nature of law and of the function of the lawyer in society, so that the conceptual limits on what seems appropriate for a law faculty curriculum are narrower.

There is yet another, more fundamental, basis for the difference. It is the belief, still widely held in the civil law world, that law is a science. From this it follows that the purpose of legal education is to instruct the students in the elements of the science. Such an approach tends to be dogmatic. The truth is known by the professor and is communicated to the students. There are, of course, disputes among scholars, and on some points one can find two or more theories that are sufficiently significant to deserve mention. But on the whole, the general structure, the broad outlines, are thought to be established. There are recognized categories. The law is divided into agreed subdivisions, which are taught as courses. The area of doubt is so narrow as to be imperceptible. Blessed with such certainty, the civil law feels less need for innovation and experimentation....

In the civil law world, the educational focus is primarily on substance; method is de[-]emphasized. In the United States, we are of course concerned about what we teach; but the emphasis is less on what is taught and more on how it is taught. We are concerned about developing certain qualities in the student: skill in legal analysis, the ability to distinguish the relevant from the irrelevant, the ability to deal with a large mass of facts in an authoritative way, the ability to put together careful and persuasive arguments on any side of a legal question, the ability to think usefully and constructively about social problems and their solution. Of course the student needs to be familiar with the existing law before he can responsibly discuss its application to concrete social questions, but we see that as

the easy part. Rather than devote valuable class time to discussing what the law is, we expect the students to be familiar with it through prior reading. We focus, instead, on how it does or does not work, on its implications, on the social reality out of which it grew, and so on.

Our objectives accordingly raise important questions of method. How can we prepare students to deal thoughtfully, responsibly, and usefully with the kinds of social problems that will come before them as they assume public and private positions of leadership? The traditional system of education in civil law universities obviously assumes a different function: The professor lectures; the students listen. That system is clearly designed to convey information to the student. The information is substantive knowledge. There is little concern with method of the sort that preoccupies American law teachers....

The fundamental differences between the traditions of teaching can be reduced to two. First, American legal education assumes that the student has studied assigned material before the class. In the civil law world, it is assumed that the student has not studied in advance of class; indeed, the main purpose of the lecture is to instruct him, to transfer basic knowledge to him. Second, in the United States the student is expected to participate actively in class discussion. Again, the contrast with law schools in the civil law world is clear. There the student does not participate; he is a passive, receiving object. The professor talks; the student listens....

The reasons our methods differ so sharply relate to differences in university context and to divergences in attitude toward the objectives of legal education, the nature of legal scholarship, and the roles and functions of lawyers in the two systems. It bears repeating, however, that our objectives and methodology are not tied to judicial decisions. Our case law provides a rich, fascinating, and relevant body of study material, but equivalents or alternatives are certainly conceivable, and probably exist, in civil law nations. The active method does not necessarily presuppose the doctrine of *stare decisis* or the study of judicial decisions.

5. STUDENTS

... [O]ur student bodies are, on the whole, much smaller. At the Stanford Law School we have a total of approximately 450 students. The Harvard Law School, which is considered large by our standards, has approximately 1,500 students. In the civil law world one typically finds much larger student bodies. The University of Rome, with [20,000] or more, is now the most extreme example. At some point (or points) on a continuum between 450 and [20,000] students, the human dynamics of the process of legal education drastically change. There are important qualitative differences between large and small law schools flowing from the simple fact of different student body size.

Another significant point is that American law students are expected to be full-time students; they are expected to devote their full energies to their studies and not to engage in any other significant enterprise for the 3 years of law school. In a number of civil law jurisdictions, attendance at the university faculty of law is very much a part-time undertaking. The difference can be exaggerated and is, in the end, one of degree, but the expectations of the two traditions are really quite different: in the United States, our expectation that the students will be full time makes it reasonable for us to make greater demands on, and to maintain higher expectations of, their performance. Students' lives are expected to center around the law school. They are expected to be there not only to attend classes but to prepare for them, to work in the law library, and to involve themselves in law review or the other paracurricular organizations that seem to grow up around our law schools. In civil law universities, there is no such assumption and consequently no basis for such expectation. Frequently, if only because of inadequate classroom facilities, it is not even anticipated that the students will regularly attend classes.

A third unique feature of our system is that it places great responsibility on the student. One sign of this greater responsibility is the student-run law review, a phenomenon that exists at over a hundred law schools in the United States.... The tradition is for such reviews to be independent, free of faculty authority....

Law review experience is still the most prestigious component of what has become, at many law schools, an extremely rich extracurriculum. The student may choose from a variety of activities: trial and appellate moot court, legal aid and civil rights organizations, environmental law societies, international law journals. Such institutions are also student-initiated and student-run. Professors help (when they are asked) and activities are subsidized by law school funds or by gifts or grants solicited by the students themselves from foundations or private donors. The extracurriculum is an extremely important part of legal education for a substantial number of students in American law schools. There is nothing remotely comparable to it in European law faculties.

6. NOTES AND QUESTIONS

1. Universities teaching national law are relatively recent in origin. In the medieval European universities, including the two in England, one studied Roman law, canon law, or both, but not the local or customary system of rules. The systematic study of national laws at university law faculties developed in the 18th century as an aspect of the intellectual revolution.

On the experience of bringing intellectual respectability to the teaching of law in the United States, see David S. Clark, *Tracing the Roots of American Legal Education—A Nineteenth Century German Connection*, 51 *Rabels Zeitschrift* 313 (1987).

2. Mirjan Damaska isolates three essential ingredients of continental law school experience. Taking the first one, the grammar of law—what advantages do civilians find in its development and use? To which of the five subtraditions of the civil law tradition is it most closely related? What would an American lawyer think about its utility?

3. Why do American law schools in the first semester not offer a panoramic view of the totality of U.S. law? Should they?

4. What is the fundamental difference between the civilian and American patterns of legal reasoning taught in law schools? Is this difference due more to philosophical disagreement about epistemology (the nature of knowledge) or more due to the structural disparity between civilian general education and American professional education?

5. Prepare a list of the dichotomies that John Merryman develops to compare legal education “there and here.” Which seem most significant to you? Would you disagree with any of his characterizations of U.S. law schools?

The remaining excerpts in this section examine the experience of specific civil law countries in teaching law. Use your list of dichotomies as a preliminary device to analyze the situation in each country. At the end of Section A be prepared to present a revised list of dichotomies, supported by specific information, and to discuss major differences among civil law nations.

See Louis Vogel, *Dynamics of Legal Systems and Legal Education: Interactions in the United States and Continental Europe*, 15 *Seton Hall L. Rev.* 744 (1985).

C. STATISTICAL HISTORY OF EUROPEAN LEGAL EDUCATION

Country	1950	1960	1970	1980	1991
Germany	12	18	32	65	83 ¹
Italy	37	50	59	148	142
Spain	17	14	21	80	160 ²
Private Universities			2	4	8 ²
1 For unified Germany.					
2 In 1988.					

Table 8.1 reveals the statistical history of legal education in Germany (West Germany before unification day: 3 October 1990), Italy, and Spain Since World War II. Taking 1950 as our base year, we See that legal education was relatively more popular in Italy (36,635 students) than in Spain (16,853 students) or Germany (11,916 students). The number of law students per 100,000 population was respectively 79, 61, and 24. As societies in the postwar period developed, the number of students choosing to study law at the university steadily grew until 1970 (faster in Germany, but with some stagnation in Spain under General Franco). Then in the 1970s there was an absolute explosion in law student enrollment, as universities eased entrance requirements and students generally viewed law as a useful preparation for a number of careers. This growth continued in Spain during the 1980s, but slowed in Germany and actually declined slightly in Italy. The number of law students in 1991 stood at 159,692 for Spain (1988 figures), 142,332 for Italy, and 83,398 for Germany. Per 100,000 population the student differences were even greater: 410, 246, and 105, respectively. Perhaps the wealthier a nation, and the more elaborate its university system in terms of disciplines available, the smaller the ratio of law students to population.

Country	1950	1960	1970	1980	1991
France	23	13	24	16	
Germany	10	9	9	7	6 ¹
Italy	16	19	9	14	15
Spain	31	18	10	17	22 ²
1 For unified Germany.					
2 In 1988.					

Table 8.2 could support this last statement. Universities in general after World War II were expanding more rapidly than law studies, so that the percentage of university students in law declined until 1970 (until 1968 in France). Germany best illustrates this point, since the relative popularity of legal education has declined up to the present. In France, after a large surge in law enrollments in the late 1960s and in 1970, decline reappeared through the 1970s. On the other hand, the relative popularity of law studies today is stable in Italy and even growing in Spain.

In Europe law remains a popular course of study for careers outside the legal profession, even in Germany. The percentage of law students who actually graduate with a law degree is low. In Italy 13,657 graduated (in 1991) out of 142,332 studying law, in Spain 12,511 graduated (in 1988) out of 159,692

students, and in Germany 8,499 passed the first state exam (in 1989) out of 83,398 students studying law.

Table 8.3 illustrates the feminization of law study in the second half of the 20th century. In Germany the percentage of women studying law increased from six percent in 1950 to 42 percent in 1989. This trend appeared in other sectors of legal education, although more slowly. The percentage of women receiving doctorates (in 1989) or working on the professional staff of law faculties (in 1988) was 16 percent, while the full professorate remained essentially male (only two percent or 12 women in 1988). The percentage of women law graduates in France for 1980 was 50 percent and in Italy for 1991 was 49 percent.

<u>Position</u>	<u>1950</u>	<u>1960</u>	<u>1970</u>	<u>1980</u>	<u>1989¹</u>
Students	6	11	12	31	42
Passing First State Exam		10	11	28	39
Doctor Degree		4	4	8	16
Teaching & Research Staff		2		10	16
Full Professors				1	2
1 Percentage students is for unified Germany in 1991; staff and professor data are for West Germany in 1988. For unified Germany.					

Teaching (and research) staffs at European law faculties remain small relative to student body size. In Germany this component (with full professors in parentheses) rose from 750 (310) in 1960 to 1,444 (506) in 1972, to 2,013 (742) in 1980, leveling off at 2,102 (749) by 1988. This latter figure yielded a ratio of 40 to 1 law students to teaching and research staff. With 2,766 law teachers and researchers in Italy (860 full professors), the ratio was 51 to 1 in 1991. The ratio in Spain in 1988 for 3,099 law teachers and researchers was 52 to 1.

1. QUESTIONS

Ask your librarian to help you find statistical information about legal education in the United States since 1950. How has it developed in terms of the number of students, its place within higher education, the entrance of women and minorities, and the student-faculty ratio? What explains the major statistical similarities and differences between U.S. and European legal education?

D. CURRENT DEVELOPMENTS IN EUROPEAN LEGAL EDUCATION

Norbert Reich, Recent Trends In European Legal Education: The Place Of The European Law Faculties Association, 2002 Penn. State Int'l Law Rev. 21 (Fall 2002).¹³¹

1. CHANGING PARADIGMS IN EUROPEAN LEGAL EDUCATION

Legal education in Europe has undergone important changes in the last decade, even though we cannot observe a convergence with the American model of professional education so ably monitored by the AALS. The changes are superimposed to some extent on the traditional model—or, should I say, models—of legal education in different European jurisdictions.

A. The Traditional Model: Nationalism, Protectionism, and Regulatory “Overkill”

The traditional model of legal education in Europe was characterized by a great diversity. Legal education depended, to a great extent, on national policies with regard to law in general and the legal profession in particular.¹³² Legal education in Universities on the continent derived from the Roman law tradition — law being regarded as an academic and scholarly discipline to be taught by a specialized and highly prestigious professorial staff. In common law countries this was not always so—many English Law Lords never had any University law training!—and it became a result only of developments in recent years.

While on the continent the subject matter of legal studies was still quite uniform till the 18th century, the nationalistic wave coming from the French revolution and the codification movement had a special impact on legal education: it became an integral part of the nation state. In Germany and Italy, this “nationalization” only came later and was paralleled by a strong romanistic tradition in legal research and teaching which today is withering away. The *ius commune*-tradition of the *usus modernus* gradually became lost.

This focusing of legal education on the nation state resulted in strong tendencies towards protectionism and closure of the legal profession: legal education was to be conducted in one language (with remnants of Latin where

¹³¹ Professor, University of Bremen Law School (on leave); Rector, Riga Graduate School of Law; former President of the European Law Faculties Association (ELFA). Paper first presented at the AALS Annual Meeting in New Orleans — Joint Program Session on January 3, 2002, and updated to take account of the ELFA general assembly in Riga from February 22 to 23, 2002.

¹³² Unfortunately including the denial of the rule of law and human rights principles by national-socialism, soviet socialism, fascism, and the like.

Roman law was and is still taught); in one legal system, namely the national law (with little possibility for specialization in international and comparative law) giving exclusive access to the national legal profession, namely as a lawyer. Other branches of the law usually required some additional training, this again being restricted to nationals. There was no free movement in the legal profession; to the contrary, in fact, it remained one of the most protected and national professions until quite recently. Only academic titles like the doctor's degree found mutual recognition, but these usually were of no importance for acquiring access to the respective legal professions.

The recruitment of law professors by university law faculties with a monopoly in legal education followed this nationalistic and protectionist path despite high academic and scholarly requirements. There were exceptions in areas that were more internationalized—e.g., comparative law, history of law, legal theory, public international law (including European law)—but these subjects were frequently regarded as exotic and as not really qualifying for access to the legal profession. What was wanted, and expected, were teaching and training in such core subjects as civil law and procedure, criminal law and procedure, administrative law, and, later, constitutional law.

Interestingly enough, the European model—if there is such a model at all—was uniform in one respect: education in the university, or rather in specialized law faculties, was always an undergraduate education. The United States model of legal education as post-graduate education was never accepted on the continent. Nor did it prevail in the common law jurisdiction of the U.K., even though the professional orientation was stronger than on the continent.

Within this model of undergraduate university education, the national and sometimes regional systems differed greatly (e.g., with regard to length of studies and the university and/or state exams, specialization or uniformization of the model-type of jurist, practical training, etc.). The following overview may be helpful to the American reader to understand the diversity of “European” legal education.¹³³

[Chart Deleted]

The surprising result is the extraordinary length of legal education in most European jurisdictions. With the exception of the UK, Ireland, and possibly Spain, a young lawyer will enter the profession only when coming close to his/her thirties!

Another common trend in European legal education should be mentioned: there is no other profession as tightly regulated as the legal profession, whether this is monitored by the state, the judiciary, or by professional associations like the bar. Regulation increases, as we know from economic theory, barriers to entry,

¹³³ [CHART DELETED.] The following chart has been taken from Hildegard Schneider, *Die Ausbildung zum Juristen — eine rechtsvergleichende Uebersicht* [Legal education — a comparative overview], *Zeitschrift für europäisches Privatrecht*, 1999, 163, at 170.

even though it is usually justified on quality grounds that may have a hidden protectionist objective. One may indeed find the presence of a regulatory overkill in European legal education, which only lately has been challenged and modified. In recent years, educational content regulation has been softened due to the case law of European and national Constitutional courts, mostly relating to freedom of speech and free provision of service issues, but entry is still tightly controlled by national regulations which only recently have become Europeanized under the impact of secondary Community law.

2. NEW TRENDS: EUROPEANIZATION, COMPETITION, AND DE-SOVIETIZATION

The most important trends in European legal education—if there is such a thing at all!—could be regarded as its Europeanization and the impact of competition. The Europeanization movement has come from the European Union, the competitive element from American law schools. For Central and East-European (CEE) countries there should at least be mentioned what might be called “de-sovietization:” the result of establishing a new legal system based on democratic values and rule-of-law principles replacing the authoritarian system derived from Soviet times. A brief and somewhat simplistic overview follows.

A. Europeanization: Mutual Recognition and Student Mobility

The Europeanization of legal education comes from two sides: from the both the University side and the side of the legal profession. With regard to the University side, the programs on student—and teacher—mobility known as ERASMUS-SOCRATES also had an important, though quantitatively limited impact on legal education. The idea was that law schools cooperate across borders in the EU, as well as with later accession countries, to allow for student exchange and mutual recognition of credits through the ECTS (European Credit Transfer System). The EU would give financial incentives to students, teachers, and law faculties in order to promote this process but would not intervene in the curricula or the accreditation process. An optimistic estimate says that about 5% of EU-law students participated in these programs in the last 10 years. The impact on curricula was more indirect than direct: in order to make their law schools more attractive, Europeanized studies had to be developed, frequently in English, and the traditional nationalistic approach to law studies had to be broken up.

On the other side, namely access to the legal profession, the recognition directives of the EU, adopted after long and protracted negotiations in the Council and Parliament (e.g., 89/48/EEC of 21.12.1989¹³⁴ and 98/5/EC of 16.2.98¹³⁵), allow a lawyer established in one EU country to practice law in another EU country under his home and/or host title, either after an additional exam or period of study

¹³⁴ OJ (Official Journal of the EC) L 19/16 of 21.1.89.

¹³⁵ OJ L 77/36 of 13.3.98.

determined by the host country, or after three years of actual and continuous legal practice there. I do not know how many lawyers have made use of these possibilities, but it seems that the programs tend to play a role mainly within neighboring jurisdictions, particularly in the UK and Ireland, France and Belgium, and Germany and Austria, where there always have been very close historic, academic, and linguistic ties in legal education. The remaining directives on freedom to provide services only cover random activities and do not allow for genuine mutual recognition. It is too early to say that the recognition directives have been a failure or a success, but they have not had the liberalizing effect on entry into the legal profession, and in the transformation of legal education in the EU, that one might have expected. But this may change.¹³⁶

B. Competition

The opening of the legal profession and legal academia to competition has probably been the most dramatic development in European legal education in the last ten to fifteen years, and it is here that the American model has had the greatest influence. The first such development concerned the type of studies themselves, especially the popularity of LL.M. programs offered by highly qualified U.S. law schools and which host some of the best European law students. Many European law faculties followed suit and have now developed their own post-graduate programs. These studies are much more open, competitive, and specialized than the traditional legal education. They are now an attractive and popular addition to what are still nationally oriented undergraduate law studies. In its Kraus judgment of 1993,¹³⁷ the European Court of Justice officially recognized the LL.M. programs and titles offered by EU law schools as part of professional career planning and training, even though they do not, as such, give access to the legal profession.

Another element of competition has been the expansion of the big U.S. law firms (mostly via mergers with British, Dutch, and German firms) which require a different type of lawyer: one who is proficient in both English and his or her native language, who masters international transactions, and refers them back to national law (i.e., taxation, company, environmental, consumer law, and mergers and acquisitions), and who is aware of the European and global impact of his or her professional work. The traditional national model of legal education is much too narrow for this new profile of an internationally mobile lawyer.

Of course the need to feed the national legal profession with lawyers, judges, prosecutors, state officials, company executives, and interest group lobbyists, trained in specific legal systems, will continue to exist. In my opinion, there will be a co-existence between a more European/international type of lawyer

¹³⁶ For a comprehensive discussion of the issues involved, see Julian Lonbay, *Lawyer Ethics in the Twenty-first Century: The Global Practice Reconciling Regulatory and Deontological Differences: The European Experience*, 34 *Vand. J. Transnat'l L.* 907 (2001).

¹³⁷ Case C-19/92, *Kraus v. Land Baden-Wurtemberg*, ECR I-1663 [1993].

on the one hand, the European complement to the Wall Street lawyer, and of the traditional “main street” lawyer on the other, from which the national legal staff is recruited. Legal teaching and practice may have to serve both needs, and this is only possible via more specialization, cooperation, and internationalization/Europeanization.

C. De-Sovietization

This term is meant to describe a process that has occurred in the past 10 years in the CEE-countries which became fully independent after the collapse of the former Soviet block. These include Poland, the Czech Republic, Hungary, and the Baltic States.¹³⁸ Most of them expect accession to the EU very soon and have concluded Europe Agreements for that purpose. Programs for legal change and transition have been initiated both by the U.S. (CEELI) and the EU (PHARE), programs in which this author has participated in a number of countries.

The impact of this dramatic change in substantive law on legal education is, however, not yet clear. On the one hand, most countries have developed new models of legal studies. Private law schools financed through substantial tuition payments of their students have become very popular — probably more popular in the CEE-countries than in the EU! Not all countries are as lucky as the Baltic States to have found donors for a highly qualified post-graduate education which does not charge tuition fees, as is the case with my own Riga Graduate School of Law (RGSL), which is financed by the Swedish government, the Soros Foundation, and the Latvian government for a period of 10 years.

The old and sometimes very traditional law faculties are, however, coping with an inadequate personnel structure inherited from Soviet times; many of them have not yet found their place in modern legal education. Because they are generally under-financed, with students and professors alike finding it necessary to work in other jobs outside the University in order to earn a living, there is little time left for genuine academic research; consequently, there is little output by bright young academic teachers.

Access to the legal profession is still somewhat opaque in the CEE countries, and only a few jurisdictions have developed rules of their own in this respect. It was perhaps easier to shake off the body of law inherited from Soviet times than the persons who administered it. On the other hand, there is a great need for qualified legal services, especially in establishing market relations and preparing for membership in the EU.

3. THE SO-CALLED BOLOGNA CHALLENGE: ELFA’S REACTION

The model of higher education in Europe has, as of late, come under

¹³⁸ Cf. Krystian Complak, *The Past, Present and Future of the Legal University Studies in Poland*, 0 Eur. J Legal Educ. 32 (2001).

considerable criticism insofar as it lacks transparency, mobility, and competitiveness in comparison to the U.S. model; in that it does not attract enough qualified students or, when it does, keeps them too long in the University; in that it produces remarkable drop-out or failure numbers; and, in that it does not live up to the standards demanded by an ever-changing international, professional, and academic environment. Such criticism is not specifically directed at legal education, even though in most ELFA member countries there is an intense debate on the future of traditional legal education. Reform models, it seems, are being experimented with everywhere.¹³⁹ ELFA seeks to influence and steer this process as far as legal education is concerned. But it must proceed cautiously, step-by-step, out of respect to the idiosyncrasies of its member faculties. It cannot simply propagate a uniform new model of European legal education. ELFA must (and will) respect the diversity of legal education in Europe.

The so-called Bologna-process in Europe is intended as an answer to the deficits detected in higher education.¹⁴⁰ It started in 1998 as an initiative of European University Rectors. The group assembled in Paris, home of one of the oldest and most prestigious European Universities. It was followed, one year later, by the European Ministers of Higher Education, who assembled in Bologna, an even older place of higher education with particular importance for law. The 1999 Bologna Declaration of the European Ministers of Education suggests, to put it simply, a restructuring of higher education by a uniform 3/5/8 year sequence of degrees (e.g., the “Bologna Process”), following suit with the classical American college and university education model. It therefore starts with a bachelor’s degree, possible after three years of studies. It then offers, for more qualified students, a master’s program of an average of two years. After three more years of study and research, the result is a doctoral degree, intended for those wanting to enter academia. Obviously this new model of awarding degrees is not an end in itself: the goal is to increase the quality, transparency, and competitiveness of a truly European area of higher education and, at the same time, considerably shorten the length of studies and reduce drop-out rates.

The Bologna Process, regularly nourished by biannual meetings of the European Education Ministers, has had its first successes in some countries that are trying to restructure their higher education systems by offering bachelor’s and master’s degrees, and abolishing the old and somewhat chaotic diversity of academic titles. Universities in other countries are keeping their traditional grades and degrees, but complement them with the new scheme.

Of course, there is also widespread criticism of the Bologna-model, even

¹³⁹ With respect to Germany, see Johannes Riedel, *The Reform of Legal Education in Germany*, 0 *Eur. J Legal Educ.* 3 (2001).

¹⁴⁰ For a good overview, see Inge Knudsen, *Introduction to the Sorbonne Declaration*, *id.* at 45. For a point of view from the United States, see Mary Kay Kane, *An American Perspective on the Bologna Declaration*, *ELFA Newsletter*, No. 1, 2001, at 62; see also Carl Monk, *Comments...*, *id.* at 64.

though a general and somewhat diffuse agreement can be found on the question that something must be done to improve higher education in Europe, make it more competitive, and to combat high drop-out rates.

The Bologna Declaration is usually associated with the so-called bachelor/masters/doctorate (B/M/D) model of awarding degrees in higher education according to which the cycle of studies is to be divided into

- A three year undergraduate study resulting in a bachelor's degree
- A one or two year(s) post-graduate programme leading to a master's degree
- A three year doctoral programme.

1. The Bologna B/M/D model of division of higher learning has the advantage of a certain simplicity and transparency but is not completely compatible with the needs and conditions of professional education and training, e.g. in law. ELFA urges the responsible persons engaged in the process of implementing the Bologna Declaration to devote more attention to the specific needs and standards of professional education. For legal education this is all the more important since the mutual recognition of diplomas and free establishment of lawyers has already been regulated by EC directives 89/48/EEC and 98/5/EC. It may therefore be useful to co-ordinate and make transparent, without trying to harmonise them *strictu sensu* on a European basis, the minimum standards of academic and professional training allowing access to the legal professions. This should also help to avoid distortions of competition in the exercise of the legal professions which are now provoked by different requirements and different length of study and training in law.

2. In considering the recommendations contained in the Bologna Declaration, their most important impact on legal education as offered by ELFA member faculties would be the introduction of the possibility of obtaining a Bachelor degree after three years of higher education in law — a possibility which already exists in the UK, Ireland and France but which is not accepted by most European jurisdictions. Some countries and some member faculties have in the meantime created or are considering creating the possibility for law students to obtain a Bachelor degree in law after three years of study as a sort of “fast track” education. However, this degree will not and cannot give immediate access to the legal profession (as a lawyer, judge, state official, company or organisation law expert). A II (except Spain, where plans are advanced to introduce it) European jurisdictions require substantial additional theoretical and/or practical training of usually a minimum of two years, in several jurisdictions even more. It remains to be seen whether a general framework can be established for all European jurisdictions (despite many peculiarities in their legal systems and therefore law studies) within which a law student can be admitted to practice law. Concrete proposals are developed [below].

3. Whether these two phases of legal education (the undergraduate and the

graduate part) should be finished with separate Bachelor's and Master's degrees must remain subject to further discussion and finally to the decision by those competent in the countries of ELFA's member faculties. Many member faculties of ELFA already award a Master's degree as an additional diploma to students already trained in law. These are often based on a one year degree programme documenting specialised legal or interdisciplinary training improving the job opportunities of the degree holder (e.g. LL.M. EUR, LL.M. Taxation, LL.M. Int. Law etc.). It is submitted that this type of master's degree can be integrated into the Bologna model of legal education. The European Court of Justice has recognised the importance of such an additional degree for the free movement of persons in the European Union in the Kraus decision of 31.3.1993.

4. The Bologna Declaration is silent about two further important points in the current debate on higher education, the first one being access to higher education (in law). Some but not all jurisdictions restrict or severely control access to legal studies e.g. by numerus clausus, entrance requirements, mid-term exams etc. No uniformity exists with regard to access to law schools in Europe, and it seems difficult to imagine that this will ever be possible. ELFA's prime concern has always focused on student and teacher mobility within the existing ERASMUS/SOCRATES framework. It is therefore paramount to ELFA that the consequences of the Bologna Declaration on student mobility are taken into consideration. As a rule, every student admitted to law school should be allowed and encouraged to study at least one semester in a foreign law school before being awarded a degree in law.

5. The second point on which the Bologna Declaration is silent concerns the financing of higher education. Most European jurisdictions adhere to public funding, but this consensus seems to be withering. In Germany, a private law school has been founded in Hamburg (Bucerius School of Law) where access is highly regulated and considerable tuition fees (with the possibility to obtain scholarships) are charged. Private law schools financed by tuition fees are becoming increasingly available in Eastern European countries (e.g. Poland, Estonia, Hungary, Czech Republic). ELFA is worried that financial constraints in all European jurisdictions may induce governments to pull out of public responsibility for the financing of undergraduate education (including law) which would only increase the indebtedness of young law graduates and make more difficult their later success in the professions. ELFA would welcome a clear commitment of the European education ministers not to change the existing public financing of undergraduate studies and they should maintain and improve it for post-graduate legal education.

6. ELFA is currently planning to undertake an inquiry among its member faculties on the practical experiences with the ECTS system and its development from a credit transfer to a credit accumulation system. At the moment the existing schemes of grading and assessment in the study of law vary considerably among European jurisdictions, and simple solutions to overcome these differences will not

easily be found. In our opinion, considerable work still has to be done to extend the ECTS system as a true and reliable indicator of quality in higher education.

If European legal education wants to compete with the highly successful US-American system of education for lawyers, a number of additional and more courageous steps have to be taken which will need a careful discussion (which has already been started by ELFA during its annual conferences in Amsterdam, Milan and Riga and which will continue on-line at the ELFA forums and at Birmingham conference in February 2003). Little attention has been paid so far how the bachelor and the master's programmes can be organised so as to avoid unnecessary repetition of subjects. ***

*** The process of Europeanisation and flexibilization of legal education in Europe will need careful monitoring which may eventually result in the evaluation and eventual accreditation of truly European study models. This task should be conferred upon ELFA in co-operation with relevant university and professional associations.

***D. Developing a Common Core of Teaching in European Law Faculties:
A New Challenge for ELFA?***

One of most recent and far-reaching challenges to legal education in Europe is the development of more Europeanized curricula. There is a fundamental debate among legal scholars whether European legal systems are converging or not.¹⁴¹ In my opinion—and I think most ELFA members share this opinion—the process of Europeanization has progressed rapidly in the last ten years, even though national systems retain their distinctive traits stemming from tradition, culture, and language. The Amsterdam annual meeting, in 2000, was devoted to this subject. In his keynote address, the former Advocate General of the European Court of Justice, Professor van Gerven, singled out a mutual process of rapprochement of European and national law. On the one hand, European law via its supremacy and direct effect theories is penetrating the everyday life of people and thereby becoming of practical importance for lawyers and other members of the legal staff. On the other hand, a process of a “common European law” in such areas as constitutional law, human rights, contracts, torts, criminal procedure is developing.¹⁴² Professor van Gerven stressed that there are a number of areas where Europeanization—and, to a lesser extent, internationalization—can be felt.

The case law of the European Court of Justice and secondary Community law, most notably directives, have not only had an impact on economic law as such (like competition and the four freedoms), but have entered divergent areas like labor law, environmental law, consumer law, data protection and, most

¹⁴¹ For an excellent overview of the somewhat exaggerated discussion, see Markku Kiikeri, *Comparative Legal Reasoning and European Law* 63-69 (2001).

¹⁴² Cf. Reich, *supra* note 8, at 186.

recently, citizenship.¹⁴³ European law is not just something to be taught as an optional course at the end of law studies, but has become the fundamental subject matter of how people live together and organize their transactions; not only in the EU, but also in the accession states.

The European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights in Strasbourg have become ever more important for the Member States of the Council of Europe, going far beyond the EU itself. Human Rights law has shaped and transformed such different areas as family law, criminal procedure, and election rights. One day it will become the common value of all European states, of their mechanisms of law enforcement, and of the legal position of their citizens themselves.

Beyond the area of hard law harmonization and uniformization, a soft law common core of European contract, tort, and personal securities law is rapidly emerging. Such important scholarly initiatives as the General Principles of European Contract and Tort¹⁴⁴ Law have led to a lively discussion on the feasibility of a European Civil Code,¹⁴⁵ which, in turn, provoked an EC-Commission communication on European Contract Law.¹⁴⁶ Why not use this valuable material for law teaching? Why not follow the American model and first try to flesh out the common core of European (contract, tort, procedural, constitutional) law and only at a later stage teach the specificities of national legislation? Such methods were already used in the Europe of the *usus modernus*, why not return to them today?

Internationalization of law teaching is a consequence of the globalization of legal Transactions. The Vienna Convention on the International Sale of Goods (CISG), which has been adopted by all European jurisdictions (with the deplorable exceptions of the UK and Portugal!) is a good example of this approach. Areas like transport law, maritime law, universally applicable conflict rules on contractual obligations, and commercial arbitration are already, to a great extent, globalized.

It is not the task of ELFA to work directly in the field of legal education, nor to develop common European curricula. But it will certainly stand at the forefront of those actively participating in the Europeanization and internationalization of legal education. ELFA will go about this without forgetting the rich legal culture from which its member faculties come. It is in this common objective that a more intense cooperation can be developed with its much-admired

¹⁴³ I have attempted to develop this point in greater detail in Norbert Reich, *Citizenship: Yesterday, Today and Tomorrow*, RGSL Working Paper No. 3, 2001 (copy on file with author).

¹⁴⁴ See generally *European Tort Law — A Case Book* (Walter van Gerven ed., 2001).

¹⁴⁵ See *Towards a European Civil Code* (A.S. Hartkamp et al. eds., 1998); a working group on a European Civil Code has been established by Professor von Bar.

¹⁴⁶ Commission's Communication on European Contract Law, COM(01)398 final, available at http://europe.eu.int/comm/consumers/policy/developments/contract_law/index_en.html (last visited Aug. 22, 2002). For a detailed discussion, cf. *An Academic Green Paper on the Commission's Proposal on a European Contract Law* (Stephan Grundmann and Jules Stuyck eds., 2002).

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E. CURRENT DEVELOPMENTS IN LATIN AMERICAN LEGAL EDUCATION

Monica Pinto, *Developments In Latin American Legal Education*, Penn. State Int'l Law Rev. 2002.¹⁴⁷

In Latin America, public education has been, and remains, a matter of public policy. Its development and its potential to reach different social classes has depended on the economic model of each society; consequently, it has reflected, to varying degrees, the fragmented nature of the societies in the region.

By definition, public universities are large institutions and, within them, law schools traditionally are very well populated. Law schools and, too, universities, have suffered the ramifications of the de facto regimes that, from time to time, have emptied our classrooms of the minds that Europe and the rest of the world honored through international chairs and well known prizes. The curricula and the faculty experienced changes. This antecedent explains that academic freedom is a must and pluralism is the device.

It was not until the 1950s and 1960s that private university education was authorized in the region. Prior to that time, confessional institutions run by the Jesuit corporation—the Del Salvador University, the Holy See, The Catholic University, and the Austral University administered by the Opus Dei—were the established schools in the area. In the 1990s, additional corporation-sponsored institutions were established.

Very expensive and exquisite teaching is provided by institutions like the Universidad de Lima, the Universidad Diego Portales, and the Universidad Torcuato Di Tella. Their performance is quite good. They have not, however, attained the requisite number of graduates needed to exert considerable influence in society. They average approximately 50 graduates per year. Nevertheless, in some countries private universities are larger than public ones, as can be seen in Chile and Columbia.

Most public universities have a one cycle curriculum that requires compulsory class or passage of compulsory exams. A professional first degree is awarded upon successful completion of the curriculum. A continental law regime promotes the uniformity of substance and method. Law schools generally follow the European model of large lecture-style classes. Links among law professors in the region have been excellent and the signature of agreements has been traditional. Unfortunately, we are unable to assess whether those arrangements have been the instrument for an exchange.

¹⁴⁷ Professor and Vice Dean, University of Buenos Aires School of Law, Argentina Former Assistant Dean for Academic Affairs (1994-2002).

Law school curricula used to be very provincial in outlook and only the teaching of public international law demonstrated to students the existence of a larger legal world.

In the 1980s, Latin America began a new democratization period in which the respect for the rule of law was supported by the introduction of new economic patterns. At that time, most Latin American countries were burdened with international debt. The attempts to create a new international economic order, namely the NIEO, failed in the 1990s.

Then, an internationalization of legal studies began. In Argentina, human rights law became a mandatory course in the law school curriculum of the University of Buenos Aires and, for historical reasons, included material on the Inter-American System as well as the universal system. Environmental Law, which took off after the Stockholm Conference in 1982, was next on the list. In the past decade, those countries—our countries—were integrated into the free-market model with the assistance of international financial institutions and the United States Government. Economic Integration, Trade Law, Bioethics, and International Criminal Law were all incorporated into the law curricula.

In the 1990s, post-graduate studies in the United States, generally LL.M.-oriented, became somewhat more affordable, from both the intellectual and economic point of view, for the majority of middle-class students. Nevertheless, the feasibility of any such candidate to engage in post-graduate studies remained, in large part, a matter of his or her economic and social position. As law firms increasingly sought attorneys trained in foreign institutions and in different legal systems, they began to require LL.M. degree holders and changed their way of providing services. They organized like American law firms and retained prominent professionals.

Legal education continued to up-date programs focusing on novelties in different fields of law. Our own experience at the Post-Graduate Department of UBA is that the number of courses offered has doubled since the early the 1990s. Of course, law schools in the region have approached the internationalization of legal education via different strategies. Undergraduate students and faculty, too, began similar exchange programs and they proved to be very fruitful.

The main challenge from the Latin American perspective is implementation: how to fill in the gaps, how to cope with the differences, how to balance the disparities between parties (e.g., a large public, tuition-free, institutions in Latin America vis-à-vis a rather small, private, and selective institution in the United States). High foreign language standards, strict selection processes, and a rigorous selection of upper grades holders are helpful criteria.

Historical and traditional reasons lie behind the excellent relationship between Latin American and Spanish law schools, less important are ad intra Latin-American links. Co-operation with non-Spanish-speaking European institutions is not as frequent because of the smaller number of candidates speaking the given language. Links with Law schools in the U.S. are special—

even when the great majority are private institutions, as living expenses are cheaper than in other parts of the world. Foreign language and teaching methods adapted to a common law system also make a difference.

Let us consider a representative sample of the situation in Latin America. In Chile, the Universidad de Chile, a public institution, offers student exchange programs with the Law School of Paris II (Panthéon-Assas) and the University of Puerto Rico, as well as a “visit” to Yale Law School. This visit lasts two weeks and it allows interaction with local students and faculty, albeit mainly on social grounds, as it does not authorize course enrollment. This seems to be a standard practice of Yale Law School because it has established a similar program with the Law School of the Universidad de Palermo, a rather young private university in Buenos Aires. Undergraduate studies—special programs as well as English courses—are offered to the Chilean Universidad Diego Portales fourth year Law students in several U.S. law schools, namely Charleston, Texas Christian University, the University of Delaware, Boston University, the University of New Orleans, Tulane University, and the University of California at Riverside. The Universidad Diego Portales reciprocates at its Santiago headquarters, and they receive approximately 200 students from Germany, Belgium, France, the U.S., and Argentina.

The Universidad de Asunción (UNA), the main law school in Paraguay, has celebrated a great number of co-operation agreements with other universities in the world, mainly with Spanish-speaking but also some English- and French-speaking law schools. These macro-agreements provide the framework by which cooperative arrangements have to be created and fostered. As is often the case with other cooperation policies, it is difficult to ascertain precisely how successful these agreements have been. The Peruvian Universidad Nacional Mayor de San Marcos shows a similar pattern. These macro-agreements evidence little importance if they are not implemented in a specific field of law.

In Argentina, most national universities have agreements in force with partners in Europe, primarily with Spain. On the other hand, our neighbor Uruguay has developed a different pattern, namely a well-done policy of international relations within the region. In fact, the Universidad de la República, in Montevideo, is the founder of the so-called “Asociación de Universidades del Grupo Montevideo” .

Education is not an item expressly mentioned in the 1991 Treaty of Asunción, the agreement that established the Mercosur (Common Market of the South) among Argentina, Brazil, Paraguay, and Uruguay. Early in the development of the relationship, which also affects Bolivia and Chile, it was agreed that high school degrees would be ipso facto valid for the purpose of allowing university applications and most university degrees for post-graduate courses. In June 1998, an optional system for the evaluation of graduate studies was instituted with implementation committees at the domestic level. A year later, the Common Market Council approved an agreement granting mutual validity to

first university degrees as well as to post-graduate degrees for teaching and research purposes. The most-favored nation clause is included in the agreement.

Relationships among law-schools have materialized through other associations, too. The Presidents of six universities in Brazil and in Argentina, and of the public universities of Asunción in Paraguay, Chile in Santiago, and de la República in Montevideo, established the Asociación de Universidades del Grupo Montevideo (AUGM) with the aim of collecting the best human and material resources of the region, to capitalize research and development, to improve continuous education and the management of large public institutions, and to enhance the involvement of the university with its society. Soon after establishing the AUGM, the Deans of the respective law schools began to meet on an annual basis: in 1999, at the Universidad de la República in Montevideo, Uruguay; in 2000, at the Universidad de Buenos Aires, Argentina; and, in 2001, in Florianópolis, Brazil. A number of initiatives have come about as the result of their meetings. One of the main items on the agenda of the Law Branch of the Asociación de Universidades del Grupo Montevideo is the mobility of faculty and students.

Two other gatherings are worthy of mention. The first is the Unión de Universidades de América Latina (UDUAL), founded in 1949. Faculty and student exchange is one of its main goals. The second is based in Argentina, a permanent Meeting of Deans of Public University Law Schools that is convened twice a year.

I will now relate the tale of my own law school, the University of Buenos Aires School of Law.

When democracy was re-established in 1983, public universities recovered their “autonomy” and their peculiar governing system. Like each academic unit within UBA, the Law School is headed by a Dean and a Board composed of representatives of the faculty, the students and the alumni. All board members are appointed after polls are held in their respective constituencies. The Dean and the Vice-Dean are appointed by the Board which, after proposal of the Dean, also appoints the Assistant Deans for Academic Affairs, Finance, Research, and for Activities with the Community.

The curriculum in force was approved by the Superior Council of the University of Buenos Aires by Resolution 809 in 1985. Teaching is divided in three cycles, namely the Common Basic Cycle, the Common Professional Cycle, and the Professional Oriented Cycle.

The Common Basic Cycle (CBC) constitutes the first year of all the degrees offered by the UBA. It consists of six mandatory subjects that have to be satisfied in order to be enrolled in the next Cycle. CBC Administration is concentrated in one academic area for all the students of the UBA. For law students the subjects are: Introduction to State and Society, Introduction to Scientific Thought, Law, Economy, Political Science, and Sociology. The two other cycles are managed directly by the law school.

The Common Professional Cycle (CPC) consists of 14 courses that lead to

a Bachelor of Law Degree. The Professional Oriented Cycle (CPO) has three mandatory subjects for all orientations and 52 credits. A first law degree is awarded at the end of this cycle, which also entitles the graduate to practice law after registration to the respective bar. This three-cycle curriculum allows the Law School to have rather large courses in the CPC—a maximum of 80 students—and small seminars in CPO—not more than 30 students—in a good mix of the approaches practiced by, respectively, the large, public universities in Europe and the small, selective institutions in the United States.

In the context of legal studies, UBA Law School's purposes are to provide its students with a strong basic education so that they can understand concepts and institutions, develop their abilities, and to properly draft such legal instruments as might be required in everyday situations. To that end, the first cycle of study is designed to provide the context within which the knowledge of rules, general principles, legal doctrine, and case law has to be reached. These learning and teaching activities promote reasoning, legal reading, critical analysis from a legal standpoint, as well as an understanding of other perspectives, such as finding a solution or to achieve an alternative dispute resolution method.

Students arriving at the last cycle must choose their main orientation and allocate twenty credits to it. The remaining credits are distributed in at least two different areas, with four in Jurisprudence and four in Social Sciences. The other eight are for a mandatory litigation course. In this final cycle, the student has to go through the fundamental questions of the field of interest he or she has chosen, and arrive at an understanding of other issues that also tend to be encountered in that field. The seminars are offered in a workshop format to achieve this end. The objective of this scheme is a graduate with sufficient legal reasoning to be clear about the situations he or she has to face, of their significance, and of their possible diagnosis and corresponding courses of action. Our graduate must develop his or her abilities in order to be able to achieve a foundation in the main discipline of choice and in those areas of the law related to it, and to update that knowledge constantly.

The school year is divided into two academic periods or semesters, the first starts in the second week of March and ends by the end of June, and the second starts in the second week of August and ends in the last week of November.

Last year, the first year of the twenty-first century, the Law School implemented two important instruments that will be enforced beginning with this academic year. On one side is what we call a "quality control system," which will allow our students to write an evaluation of teaching methods and contents, as well as of professors, at the end of each course; second, and interrelated with the first measure, a system to maintain student status, namely a series of requirements that must be satisfied yearly in order to retain standing as a student. The first instrument will make compulsory a practice that several professors already utilize in their courses and the second will reduce the number of students considered to be enrolled, in light of the fact that many "passive" students remain in the records.

In 1996, the international programs department of the University of Buenos Aires Law School began investing in cooperation programs with foreign institutions, focusing primarily on student and faculty exchange. We started with a post-graduate program with the Catholic University of Louvain and the University of Paris-Sorbonne (Paris I) on Corporations and Contract Law.

On the undergraduate front in the U.S., we began our exchange with Columbia Law School in 1996. We have more or less the same sort of engagement with Tulane Law School and the Boston University School of Law. On a non-conventional basis, we have received students from the University of Colorado at Boulder, the University of Miami at Coral Gables, and the University of Texas at Austin. In Europe, we have an agreement in force with the University of Paris Panthéon-Assas (Paris II) and Louvain-la-neuve (Belgium). We also signed an agreement with the University of Orleans last year. We have also received students from Germany, Finland, the Netherlands, and Switzerland.

All of these agreements proved to be very important for the development the curriculum offered to the large student body of UBA. The early participation in moot courts contributed significantly to that end. In the last six years, UBA Law School has participated in the Philip Jessup International Law Moot Court Competition, sponsored by the American Society of International Law (where our team has been ranked among the first ten); in the Inter-American Human Rights Moot Court Competition, organized by American University (where we have been the winners twice); in the the Jean Pictet International Humanitarian Law Moot Court, organized by the International Committee of the Red Cross (where we reached a second position last year among five institutions, all of which, aside from our representatives, were French-speaking); and in the Willem C. Vis International Commercial Arbitration Moot, held in Vienna.

These strategies and tools further enhance the quality of the teaching and learning processes in a large universe of students and professors. We are well aware of the difficulties of reaching a homogeneous level in an institution with the features of ours; however, we are not in a position to give up that goal on the sole grounds of our dimension and heterogeneity. Instead, we are trying to build a pluralistic community.

Post-graduate legal studies at the University of Buenos Aires Law School fit in the common pattern of most high-level institutions. We offer two LL.M. degrees (e.g., a Master in International Relations and a Master in Law and Economics) and the J.S.D or Ph.D in Law. A winter program in four different areas is offered each August for local graduates and for those coming from other domestic and foreign universities; teaching is in Spanish. However, most of the courses offered by visiting faculty are organized in English.

The Law School has been awarded the task of compiling and editing the Law Digest. Its prestige and its faculty were the two main items considered by the Ministry of Justice in the selection process. The main legal publishing houses decided to join UBA in its presentation.

Several programs are under study, namely an LL.M. for foreigners—one year in Argentina studying Continental Law and Mercosur regulations—and a dual degree program with a Common Law institution.

Public education is still the best in the country. It sets high level standards for the country and its institutions. Individuals serving in Parliament, in the Judiciary, and in Administration have attended our courses.

Our mission is to offer a legal education of the highest caliber, for a large population, on a free basis. We meet this challenge with only one ideological engagement: to foster the National Constitution and the institution of Democracy. In Latin America, this is a huge task.

F. CURRENT DEVELOPMENTS IN JAPANESE LEGAL EDUCATION

NOTE: By way of historical background, please note that the Japanese bar examination allowed those who passed it to become *Bengoshi* (private litigators before Japanese courts), prosecutors or judges. Those who passed the examination were allowed entry into a special training program that would prepare the graduates for those three professions. However, bar-passage was in the 1-3% rate, which meant very few professionals joined the profession every year.

James R. Maxeiner, Keiichi Yamanaka THE NEW JAPANESE LAW SCHOOLS: PUTTING THE PROFESSIONAL INTO LEGAL EDUCATION, Copyright © 2004 Pacific Rim Law and Policy Journal Association; James R. Maxeiner; Keiichi Yamanaka.¹⁴⁸

1. INTRODUCTION

April 1, 2004 will be remembered as a remarkable day in legal education—

¹⁴⁸ This Article is a collaborative work of Professor Maxeiner and Professor Yamanaka. The former drafted the report based on English and German language publications and interviews, while the latter provided up-to-date information on current developments not yet reported or available only in Japanese. This work was prepared while Professor Maxeiner was a Visiting Scholar at Kansai University in Osaka, Japan. He would like to thank the University for its generous support. Professor Maxeiner, J.D. (Cornell), LL.M. (Georgetown), Dr. Jur. (Munich), is Visiting Associate Professor of Law at the University of Missouri Kansas City School of Law and from July 2004, Associate Professor of Law, University of Baltimore School of Law. Professor Yamanaka, Dr. jur. (Kyoto) is a Professor of Law at Kansai University and Dean of the newly established Kansai University Law School. The authors would also like to thank their colleagues in the Kansai region who generously contributed their ideas to this report: Masahisa Deguchi, Kenji Kameda, Hirokazu Kawaguchi, Satoshi Kinoshita, Hiroyuki Kubo, Mitsumasa Matsuo, Yoshiaki Sakurada, Ken Takeshita, and Toshiaki Takigawa.

the day on which more than sixty new law schools officially began operation in Japan. Such a wholesale appearance of new law schools at one time is unprecedented. While legal educators elsewhere have talked about making major changes in legal education, Japanese legal educators are making them.

Law schools are being introduced to Japan to meet an urgent need for lawyers in a legal system that historically has been underserved by legal professionals.¹⁴⁹ With only a few exceptions, the new law schools are offspring of existing university law faculties that will continue to exist independently of the law schools.

Developments in Japan should be of wide interest; legal education is “a window on [a country’s] legal system.” A nation’s system of legal education tells us much about “what law is, what lawyers do, how the system operates or how it should operate.”¹⁵⁰ It is not coincidental that the reform in Japanese legal education is part of a larger reform of the Japanese legal system.

For legal educators, a compelling reason to watch the Japanese educational reforms is to see how the new Japanese law schools insert what we call “the professional” into legal education. Heretofore in Japan, education in the law has largely been separate from practical training of would-be lawyers. The new law schools, however, are to be university graduate schools specialized in the training of legal professionals. The world’s legal educators have long sought to find the proper balance between academic education and practical training in law. This Article reports on this ongoing development in Japan as of early 2004. Part II describes briefly the relationship between legal education and professional training generally and seeks to define the concept of the “professional” within legal education. Part III sketches the current system of legal education and lawyer training in Japan. Part IV summarizes the general framework of the pending law reform. Part V reports on how Japanese legal educators are meeting the challenges in forming a new system of professional legal education.

The authors are an American jurist and a Japanese jurist who have exchanged thoughts on legal systems and legal education ever since they met more than two decades ago at the University of Munich when both were fellows of Germany’s Alexander von Humboldt Foundation. The former is a neophyte in

¹⁴⁹ The small number of attorneys in Japan has long been an issue. See, e.g., Kohei Nakabo, *Judicial Reform and the State of Japan's Attorney System Part II*, translated in 11 *Pac. Rim L. & Pol'y J.* 147, 150-57 (2002). The Internet site of Waseda University puts it succinctly: “the present system has kept the number of lawyers too small for the world's second largest economy.” Waseda Law School, *Transformation of the Japanese System*, at <http://www.waseda.jp/law-school/eng/system.html> (last visited March 8, 2004). In Japan, legal professionals customarily include lawyers, judges and prosecutors; this Article follows American usage and refers to all three types of professionals as “lawyers.”

¹⁵⁰ John Henry Merryman, *Legal Education There and Here: A Comparison*, 27 *Stanford L. Rev.* 859 (1974), reprinted with a prefatory note in John Henry Merryman, *The Loneliness of the Comparative Lawyer* 53 (1999).

Japanese law, while the latter is the Dean of one of the new Japanese law schools. Much of the information provided in this Article comes from the authors' firsthand knowledge, shared with each other in conversations beginning last summer while the former was a visiting scholar at Kansai University. The goal of the Article is the modest one of reporting contemporary developments in Japanese legal education.

Training in legal methods is neither exclusively education in the law nor exclusively practical training in the practice of law. *** Under its new reforms, Japan is about to begin shifting part of the responsibility for teaching legal methods from practical training programs run by judges to law school courses given by academics.

2. THE PRESENT JAPANESE SYSTEM OF LEGAL EDUCATION AND LAWYER TRAINING

The present Japanese system of legal education and lawyer training defers instruction in legal method largely to the training phase. The Japanese system has its origin in adaptation of the corresponding German system of the late nineteenth century.¹⁵¹ Similarities to the German system remain substantial.¹⁵² In both systems, aspiring lawyers typically study law at a university for four years after completing secondary (high) school. They then take an examination and, if successful, are admitted to a practical training program to become qualified as judges. Practical training begins with classroom-type instruction in the skills of a judge and continues with several-month apprenticeships at the courts and other legal institutions. Following completion of this practical training period, students take a second bar examination. Those who pass with few exceptions become judges, prosecutors or private attorneys.

There is, however, one crucial difference between the systems of lawyer training in Japan and Germany: in Japan the number of candidates admitted to practical training is severely limited. According to Japan's Ministry of Justice, in 2002, only 1183 out of a total of 41,459 applicants tested were admitted to

¹⁵¹ Jiro Matsuda, *The Japanese Legal Training and Research Institute*, 7 *Am. J. Comp. L.* 366, 368 n.7 (1958), attributes the Japanese system to the German Otto Rudorff, who drafted the Japanese law governing court organization. Regarding Rudorff and that law, see Wilhelm Röhl, *Deutsche Juristen in Japan: Otto Rudorff*, *Zeitschrift für japanisches Recht*, No. 5, 54, 60-61 (1998).

¹⁵² Cf. Luke Nottage, *Reformist Conservatism and Failures of Imagination in Japanese Legal Education*, *Zeitschrift für Japanisches Recht*, No. 9, 23, 27 n.11 (2000). For current descriptions of the German system of legal education, see Jürgen R. Ostertag, *Legal Education in Germany and the United States—A Structural Comparison*, 26 *Vand. J. Transnat'l L.* 301 (1993); Peter Gilles & Nikolaj Fischer, *Juristenausbildung 2003—Zur neuesten Ausbildungsreformdebatte in Deutschland*, 20 *Ritsumeikan L. Rev.* 181-218 (2003).

training.¹⁵³ In Germany, on the other hand, most students who take the examinations that govern admission to the training programs pass and are admitted to training.¹⁵⁴ The effects of this difference are so great that German observers of Japanese legal education hesitate to apply German experiences to Japan. Japan's selective legal educational system means that there are far fewer lawyers in Japan per capita than there are in Germany. Japan's restrictions complicate teaching legal methods in Japanese university legal education. Because few students studying at Japan's university law faculties are admitted to practical training, few students can reasonably expect to become lawyers. Because most students do not become lawyers and do not expect to become lawyers, they do not pursue practical training in lawyering, legal research and reasoning and clinical legal education. Training in legal methods and skills within Japan is mostly the province of the practical training period.¹⁵⁵ The focus of undergraduate legal education is on teaching an abstract body of legal principles that are not closely tied to the actual cases in which those principles are applied.

As a consequence, university education in law in Japan is not professional.¹⁵⁶ The law faculties provide undergraduate instruction in law to students, the vast majority of whom do not become lawyers. They also provide graduate legal education to a small number of students who hope to become law professors. University law faculties do not, however, provide rigorous training in applying law to facts, the skills required by professional lawyers.

In any given year there are approximately 45,000 undergraduates studying

¹⁵³ Ministry of Justice, available at <http://www.moj.go.jp/PRESS/021113-1.html> (last visited Feb. 15, 2004). The number is to be increased to 3000 by the year 2010. The Justice Reform Council, Recommendations of the Justice System Reform Council—For a Justice System to Support Japan in the 21st Century ch. I, pt. 3, 2(2) (2001), at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> (last visited Feb. 15, 2004) [hereinafter Reform Report]. Also noting the "key" difference is Nottage, *supra* note 18, at 27 n.11.

¹⁵⁴ In Bavaria, which is known for having one of the more difficult exams among those of the German states, in 2002 more than two-thirds of applicants tested passed, i.e., 1959 out of 2903, or 67.48%. Bericht des Bayerischen Landesjustizprüfungsamtes für das Jahr 2002, 5, available at <http://www.justiz.bayern.de/ljpa/ber02.pdf>, available at the Internet site of the Landesjustizprüfungsamt of the Bayerischen Staatsministerium der Justiz, <http://www.justiz.bayern.de/ljpa/> (last visited Feb. 15, 2004).

¹⁵⁵ Miyazawa & Otsuka, *supra* note 23. While the German system of legal education places principal responsibility for professional training in the internship period, university legal education also contributes significantly to instruction in legal method. See Marutschke, *supra* note 22, at 90; Wolfgang Fikentscher, "What Are Law Schools For?, A paper presented at the IBA 26th Biennial Conference, Berlin, Oct. 20-25, 1996," (transcript available at the Garret W. McEnerney Law Library, Boalt Hall, University of California, Berkeley), quoted in James R. Maxeiner, American Law Schools as a Model for Japanese Legal Education?, 24 *Kansai U. Rev. L. & Pol.* 37, 40 n.16 (2003) (noting that at the university, students learn the "non-litigious opinion style" and in the training period the "litigious opinion style" .)

¹⁵⁶ Accord, Miyazawa, *supra* note 23, at 492 ("professional legal education designed to train future lawyers does not exist in Japan"); Waseda Law School, *supra* note 2.

at nearly one hundred university law faculties within Japan. The first year of education is given over to general liberal arts courses. While classes in later years address law, they generally do so from a theoretical perspective and do not focus on case analysis. Law faculties typically provide large lecture classes and student participation is minimal.

Japan's national Legal Training and Research Institute (Shiho kenshujo, hereinafter, "the Institute") is responsible for practical legal training.¹⁵⁷ Would-be lawyers must all gain admittance to the Institute, an agency of the Supreme Court. While perhaps unintended, the Institute's admissions procedures serve to distance lawyer training from university legal education. Admission requires neither an undergraduate degree nor prior legal studies. While most applicants have degrees in the law, the Institute's exam is so difficult that it discourages attendance at university law faculties. On average, successful applicants have taken the exam five times. Because the exam is given only once a year, few successful applicants have recently studied law at a university. It is more likely that the successful applicant has recently spent time at one of Japan's infamous "cram" schools, which focus on the Institute's exam.¹⁵⁸

The Institute uses both classes and apprenticeships to train participants in the techniques of drafting judgments, indictments and pleadings. This training encompasses the skill of applying law to facts to decide individual cases.¹⁵⁹ At the end of the Institute's training period, the participants take a practice-oriented examination which requires them to draft a court judgment, a prosecutor's final argument, or a summary brief for a plaintiff or defendant. Most participants pass the first time they take this examination. Those who pass are eligible to be judges, prosecutors or lawyers.

3. THE NEW JAPANESE SYSTEM OF LEGAL EDUCATION AND LAWYER TRAINING

The new Japanese law schools are a key element of a larger reform of the

¹⁵⁷ See Hakaru Abe, Education of the Legal Profession in Japan, in *Law in Japan: The Legal Order in a Changing Society* 153, 155-59 (Arthur Taylor von Mehren, ed., 1963); Akira Ishikawa, Training, Appointment and Number of Judges, in *Herausgegeben von Gottfried Baumgaertel, Grundprobleme des Zivilprozessrechts Band 2 (Japanisches Recht Band 19)* 2-5 (1985); Matsuda, *supra* note 17.

¹⁵⁸ See Eriko Arita, U.S.-style Law Schools to Offer Practical Approach, *Japan Times*, July 2, 2003 (noting that "[m]ore than five years of study—at cram schools, not universities—has become the norm to pass Japan's extremely competitive bar exam"). For a detailed discussion of the Institute's examination, see Edward I. Chen, The National Law Examination of Japan, 39 *J. Legal Educ.* 1 (1989).

¹⁵⁹ The Institute's apprentices are not only not charged tuition, but they also receive a substantial stipend comparable to the salary that a recent college graduate might earn. The cost of stipends for interns seems a consideration in legal training reform just about wherever an apprentice program is employed.

Japanese legal system that is designed not only to increase the number of lawyers, but also to increase the importance of law in Japan. The reform proposal was written by an independent commission, the Justice System Reform Council (hereafter “the Council”). The Council’s final report, released on June 12, 2001 (hereafter, “the Reform Report”), recommends major changes in the civil justice, criminal justice, legal education and lawyer training systems of Japan. The Council consisted of a diverse group of thirteen representatives from various parts of society.¹⁶⁰ While the Reform Report itself is an impressive achievement, what makes it extraordinary is that its recommendations were quickly and uniformly adopted as national policy and are being implemented as such without the political infighting that might be expected in other countries.¹⁶¹

The Reform Report is a mandate for increasing the role of law—and above all, the Rule of Law—in Japanese society. Chapter I of the Reform Report states: [T]his Council has determined that the fundamental task for reform of the justice system is to define clearly “what we must do to transform both the spirit of the law and the rule of law into the flesh and blood of this country, so that they become ‘the shape of our country.’” The theme of the Rule of Law runs like a leitmotif through the entire Report. The Rule of Law is to be an “essential base” for deregulation so that citizens may act independently and without prior administrative approval.

The Reform Report concludes that if law is to have an increased role in Japanese society, it is “indispensable to widely expand the quality and quantity of . . . legal professionals” In order to achieve these goals, the Reform Report calls for an entirely new system of legal education. It anticipates that “[a]s the core of the system, graduate schools specialized in training of legal professionals (hereinafter referred to as ‘law schools’) shall be established.”

The new law schools are placed between undergraduate education and the

¹⁶⁰ The members are listed at http://www.kantei.go.jp/foreign/policy/sihou/singikai/members_e.html (last visited Feb. 15, 2004). The Chairman and Vice Chairman are a law professor and university president respectively. The eleven other members include three academics, two businessmen, a trade unionist, a consumer group spokesman, an independent author, a private attorney, a former judge, and a former prosecutor. For a comment by the attorney member on the Council's work, see Kohei Nakabo, *Judicial Reform and the State of Japan's Attorney System Part I*, translated in 10 *Pac. Rim L. & Pol'y J.* 623 (2001); Nakabo, *supra* note 2.

¹⁶¹ On November 16, 2001 the Japanese Diet adopted Law No. 119 of 2001, The Justice System Reform Promotion Law (Shihoseido Kaikaku Suishinho). The law states that its purpose is to implement the Reform Report intensively and totally and to assure that the legal system has a decisive role in deregulation and societal transformation. The law established a new office within the Cabinet known as the Office for Justice System Reform, with the Prime Minister as chief and including all Cabinet ministers. On March 19, 1992 the Cabinet adopted a program for promoting justice system reform. http://www.kantei.go.jp/foreign/policy/sihou/index_e.html (Internet site of the Prime Minister of Japan and His Cabinet) (last visited March 7, 2004). There is irony in this single-minded implementation, for it would seem to be an example of the “top down” governing that the Reform Report opposes.

Institute.¹⁶² In the system being established, undergraduates are to apply for admission to law schools. They are to spend three years in law school, although individual law schools may permit students who have undergraduate degrees in law to complete the program in two years. Existing institutions are not to be eliminated. Existing law faculties are to continue to exist and to provide undergraduate and graduate education in law. The Institute and its period of practical training are similarly to continue. Law school graduates are to take an examination for admission to the Institute. Some of the practical training presently provided by the Institute, however, is to be shifted to the newly-formed law schools.

The introduction of law schools will permit Japan to reduce the training period for aspiring lawyers—already recently reduced from two years to one-and-one-half years—further to a one-year period. Once that reduction is implemented, classroom instruction at the Institute is to be eliminated and only apprenticeships retained. These reductions, combined with some expansion of resources, are anticipated to permit Japan to substantially increase the total number of trainees admitted to the Institute. The Reform Report when published anticipated that about 70-80% of all applicants to the Institute with law school educations would be admitted. It now appears, however, that because the number of new law schools is greater than expected, the actual percentage of successful applicants will be significantly lower—perhaps as low as 25-35%. While the number of applicants admitted is to be increased, the principle of restricted admission is not to be abandoned. The Ministry will determine how many applicants will be admitted to the Institute and thus, eventually, to legal practice. Japan will not follow the practice in other countries such as the United States and Germany, where all applicants who meet certain minimum standards are admitted to the profession.

The Reform Report is widely understood to follow an American model of legal education and lawyer training.¹⁶³ The Report calls for creation of new

¹⁶² The Reform Report does not discuss why it did not adopt what would seem the most obvious solution to the shortage of lawyers in Japan: a large increase in the size of the Institute or the creation of additional institutes elsewhere in the country. Such an approach would be considerably less costly and difficult than creating so many new law schools. This alternative plan was raised but not widely considered. Apparently it was felt that this approach would make excessive demands on the limited resources of the judicial system, would be too expensive, and might compromise the ability of the Supreme Court to control the education of lawyers. For a critical view of the reform from a New Zealander who has taught in Japan, see Nottaga, *supra* note 18.

¹⁶³ Yukio Yanagida, *supra* note 37; Keio University, Keio Establishes a Law School, <http://www.keio.ac.jp/12/017.html> (last visited Feb. 15, 2004) ("a new concept of professional legal training that closely resembles the US educational model."); Law Schools Hard Put to Add Judges to Faculty, *Daily Yomiuri* (Tokyo), Dec. 2, 2002, at 2 ("Modeled after U.S. law schools"); Arita, *supra* note 30. The Reform Report identifies four legal systems visited by the Council: those of the United States, the United Kingdom, Germany and France. Reform Report, *supra* note 20, Introduction. Of these countries and Japan, the proposed reforms bear the closest resemblance to American legal education.

institutions that it pointedly calls “law schools” in contrast to the existing “faculties of law.” The new Japanese law schools are to share many of the characteristics of American law schools. For example, the new schools are to be “professional schools providing education especially for training for the legal profession.” They are to provide for a three-year period of study following a four-year undergraduate education. The Japanese law schools are also to provide instruction that is interactive.

Japanese legal educators are looking to the United States as the principal model in implementing the reform of legal education. Delegations of Japanese legal educators have visited the United States. Japanese legal educators have also invited many foreign legal educators to address them on legal education. The overwhelming majority of these visitors have been Americans.

4. THE KEY CHALLENGE FACING THE NEW JAPANESE LAW SCHOOLS:

Putting the Professional into Legal Education

The Justice Council Reform Report assigns the new Japanese law schools the mission of providing “practical education for fostering legal professionals.” These new institutions are to be “professional schools providing education especially for training legal professionals”

The many challenges faced by the new law schools—both pedagogical and practical—are largely subsumed by the overarching task of discerning and fulfilling this mission of providing professional education. Collectively, the new law schools must develop the details of what it means to be professional schools training lawyers. Individually, each new law school must find its own way—and resources—to help fulfill this mission. The new law schools need imagination and inspiration; it is up to them to re-orient both the substance and methods of legal education previously offered in Japanese universities.

A. The Pedagogical Issues the New Law Schools Face Collectively

1. The Kind of Legal Professionals the New Law Schools are to Train

In order for the new Japanese law schools to meet fully the challenge of providing education and training for professionals, some consensus is needed as to the kind or kinds of legal professionals to be produced. There is nothing in the Reform Report that suggests that the new law schools should depart from the unitary system of legal education—in which all legal professionals receive the same education and training—that Japan has used for the last half century.¹⁶⁴

¹⁶⁴ Until 1947, Japan had separate training programs for judges and prosecutors on the one hand, and for attorneys on the other. Abe, *supra* note 28, at 154-55. Some observers see unitary training as of “great value since it contributes to understanding between lawyers of various categories.” Noda, *supra* note 23, at 142. Other observers find unitary education wanting. Yasuhei Taniguchi calls it “a near impossible task” and recommended a division of the training program as “[t]he

Neither does the Reform Report provide clear direction whether the new schools should adopt the judge, prosecutor, advocate or counselor role as the model for that unitary legal professional. Japan may choose between different international models of legal education. While the American model trains students to be advocates and counselors, even though they may not intend to become lawyers, the German model, on which the Japanese system was originally based, trains students to be judges, even though they may intend to become lawyers. Even if the Reform Report were clear regarding what type of legal professional provided the basis for Japan's professional education, the new law schools would still face the challenge of determining the future role of the Japanese judge, prosecutor or lawyer. These roles are markedly different in different countries.

Contemplating the type of legal professionals to be trained reveals the limits of Japanese reliance on the American educational model. The American system of lawyer education and training assumes social and legal systems different from those that prevail in Japan. Above all, the American system presupposes a common law adversary system. While many changes that have occurred in the last sixty years have moved the Japanese legal system in the direction of the American common law adversary system, its legal system and legal methods still more closely follow the German civil law system. Accordingly, education and training that is appropriate in the United States may not be appropriate in Japan, while education and training not offered in the United States may be essential in Japan. For example, American style advocacy, which is highly valued in American law schools, may be inappropriate in Japan, while judgment drafting, which is not taught in American law schools, may be essential.

Japanese legal reformers have recognized that the American model is helpful only to a point. Reformers did not, for example, eliminate the Institute's role in legal training, as they would have done had they been true to the American model. In the end, the new Japanese law schools will be decidedly Japanese institutions.

fundamental solution." Yasuhei Taniguchi, *Shiô Kenshu ni okeru hôsô kyôiku* (Legal Education at the Legal Training Institute: An Introduction), 25 *Jiyu to seigi* 7-12 (1974), translated in 1 Dan Fenno Henderson & John Owen Haley, *Law and the Legal Process in Japan: Materials for an Introductory Course on Japanese Law* 439, 442 (revised ed. 1979). The German Lawyers' Association challenges as an anachronism the German requirement that all lawyers be trained as judges. See Bericht des Ausschusses der Justizministerkonferenz zur Koordinierung der Juristenausbildung für die Konferenz der Justizministerinnen und Justizminister vom 11. bis 13.6.2001 in Trier, at 29-30, available at <http://www.justiz.nrw.de/jm/landesjustizpruefungsamt/aktuelles/pdf/bericht.pdf> (last visited Feb. 15, 2004), reprinted in *Juristisches Schulung* 2001, 933; Nikolaj Fischer, *Die neue, „anwaltsorientierte“ Juristenausbildung*, *Anwaltsblatt* 2003, 319.

2. The Substance of Legal Education and Training Provided by the New Law Schools

A critical issue in implementing the Reform Report is the substance of instruction that the new law schools will provide. The Reform Report recommends that the new law schools “provide highly advanced legal education especially for training legal professionals in order to build a bridge between theoretical education and practical education” But what makes education practical, and is that the same as what makes it professional? Moreover, how should the new law schools share responsibility for providing this kind of education with the existing faculties of law and with the national Institute?

Historically, “practice” in Japan has meant the activities of judges, prosecutors and litigators. “Practice” has not generally referred to providing counseling and drafting services. Many of the individuals behind the present reform are believed to adopt this narrow view of practice. However, other reformers—particularly those from industry—are more likely to find the benefits of practical legal education in advanced business law subjects, such as antitrust, intellectual property, and international business transactions. The new law schools may be more likely to succeed if they adopt this broader view of practical education and broaden it still further to include an emphasis on training in the legal method.

The extent to which Japanese law schools will teach the legal method of relating law to facts remains to be seen and is one of the future developments most worth watching. What transpires will be affected principally by how work is shared between the Institute and law schools and by curricular decisions made at the individual law schools and by each individual law school professor.

With respect to sharing responsibilities with the university faculties of law, the general outline is fairly clear: the law faculties in educating undergraduates—even more than before—will emphasize general education and the basics of the legal system. The law faculties will continue to provide graduate legal education for students intending to become law professors. The law schools, on the other hand, will provide compulsory instruction in core legal subjects of private and public law. The new schools will, above all, focus on students’ ability to think in legal terms.

There is less understanding among educators about how the law schools will share responsibilities with the national Institute. The shortening of the time at the Institute from what was originally a two-year period to what will be one-year program is accompanied by the expectation that the law schools will provide some of the instruction presently provided at the Institute. In particular, the law schools are expected to cover what is now covered in classroom-type instruction in judgment drafting. However, at least until the law schools are firmly established, they may not supplant completely the classroom instruction that the national Institute provides in legal method and practical skills.

Only now are the new Japanese law schools beginning to develop the

curricula that eventually will contribute to determining the substance of the legal education and training provided. The law schools are planning practical courses familiar in American legal education such as moot court, legal clinics, and externships. But they are also looking to practical courses more similar to German-style education, such as seminars that unite civil law and civil procedure in one course, and criminal law and criminal procedure in another.

The specifics of the law school curricula are beginning to become clear. Students without an undergraduate degree in law will enroll in a three-year program. Those with undergraduate degrees in law will participate in either a two or a three-year program, depending upon the requirements of the particular law school. The first year of the three-year program will consist of required courses on the fundamentals of Japanese law. The second and third years of the three-year program, as well as both years of the two-year program, will consist of three principal types of courses, many of which will be compulsory: (1) seminars and other in-depth courses in the basic areas of law studied in undergraduate school (e.g., civil law, criminal law, constitutional law, commercial law, criminal procedure, and civil procedure); (2) practical instruction by experienced practitioners in civil, criminal, and administrative procedure that combines the procedural law with the respective substantive law; and (3) electives (e.g., international law, intellectual property law, and tax law). In the first of these two years, the curricular emphasis will be placed upon the in-depth courses described under the first category above. In the second of these two years, the emphasis will shift to the practical and elective courses described in the second and third categories above. Individual law schools are likely to offer different electives. One possible point of distinction among schools may turn out to be the extent to which individual schools create opportunities for specialization in particular practice fields, such as civil litigation, commercial counseling, or criminal law.

3. The Teaching Methods Used for Professional Education and Training

Along with deciding what the new law schools will teach, Japanese legal educators are deciding how to best teach that substance. Again, the Reform Report points the way but provides relatively few details. The Reform Report calls for a shift in the method of legal education from the unilateral mass lecture typical of present-day law faculties to a “small group education system” that provides “bi-directional (with give-and-take between teacher and students) and multidirectional (with interaction among) students.”

Bringing this change about will be a marked departure from historic practices. Japanese law students are not accustomed to participating in class. To get them to do so will require substantial effort on the part of faculty members, many of whom themselves are accustomed largely to lecturing. In seeking to re-orient their students, Japanese law school professors will be at a disadvantage compared to their American colleagues, whose first year law school classes are the model for the Reform. In first year American law school classes, most students

have had little or no prior experience with the law. In first year Japanese law school classes, on the other hand, most students will have had prior exposure to the law, thus foreclosing the introduction of this new teaching method as just a part of the new substantive material.

Despite these challenges, the new law schools are determined to increase the use of interactive methods. To facilitate interaction, the Ministry of Education is requiring that law schools keep the student-faculty ratio to a low 15:1. Most law schools are to have entering classes of 100 or fewer students. Class size is also to be much smaller than the mass lectures presently common in most law faculties. Plans for the Nagoya University Law School, for example, anticipate that “[i]n small scale, challenging yet vigorous classes, students will interact with friends and teachers in a mutually reciprocating ambiance of rarified learning, all the time refining their sense of reason and justice.” Plans for the Kyoto Sangyo University Law School anticipate that one of its three lecture rooms will be “a graduated lecture auditorium that facilitates use of the Socratic Method”

4. The Professional School and Legal Scholarship

If one puts the professional into legal education, must one take legal scholarship out? This remains an unanswered question as Japan introduces law schools. Japanese law faculties have a rich tradition of legal scholarship. Some critics say, however, that this tradition has led to a disdain for practice. The Reform Report echoes this criticism, finding traditional legal education lacking both as a basic liberal arts education and as a specialized legal education. The Reform Report notes that at the postgraduate stage “the major purpose has been to train academic researchers.” This has led, it concludes, to a “gap between education and actual legal practice.” The Reform Report calls on law schools “to change themselves by shifting their principle from the traditional one focusing on research and study to a new one truly focusing on education of students.” The Report’s emphasis on teaching practical skills has led some Japanese law professors to be concerned that creation of the new law schools will lead to a deprecation of traditional legal scholarship and teaching within Japan.

The American experience does not parallel that of Japan and consequently offers relatively few insights on how the new law schools are likely to balance scholarship and professional education. American law schools did not begin—as did the Japanese law schools—with a highly developed tradition of legal scholarship. For a very long time, scholarship was not central to the mission of American law schools, which sprang up as competition to the apprentice system. Until about 1970, much of American legal scholarship focused on specific legal questions, considered in the style of a judicial opinion. All that has since changed, as American legal scholarship has moved away from doctrinal work to becoming increasingly interdisciplinary. This interdisciplinary approach looks at law “from the outside.” As doctrinal scholarship has fallen into disrepute, American legal scholarship is said to have lost its connection to practice. Legal scholarship has

increasingly become social science scholarship. Practitioners find it unhelpful and claim that there is a growing disjunction between this research and American legal practice.

Comparable developments—whether limiting legal scholarship to narrow doctrinal work or to pure social science—seem unlikely in Japan. In Japan, legal scholarship is generally of the “dogmatic” kind. While Americans might be tempted to equate “dogmatic” with “doctrinal”—especially since dogmatic is a pejorative in the American lexicon—this relation would be inaccurate. Dogmatic research entails having professors place legal rules within a legal system.¹⁶⁵ To a substantial extent law professors write and interpret the law. In Japan, as in other civil law countries, dogmatic research has a secure place. The connection of dogmatic research to practice serves to enhance scholarship by linking law to the reality of practice. Looked at this way, the creation of law schools in Japan could strengthen traditional legal scholarship—at least in practical fields—by bringing scholarship more in line with “real world” issues. Moreover, there is no reason for Japanese law professors to move away from this form of scholarship. Alternative forms of research are already available, and have not undermined Japan’s dogmatic research. Many of the existing law faculties already offer opportunities for viewing the law from the outside, in that they have separate departments in social science fields, such as political science.

B. The Practical Issues Each New Law School Faces Individually

Japan’s new law schools are not just a new phenomenon; each is also a new institution that faces its own challenges. For each individual law school, it is not enough that the concept of law schools takes hold and is successful in Japan. Rather, it is important that that law school flourishes. Thus, institutional imperatives can make practical issues of more immediate concern than long-term pedagogical issues of professional education. Each individual law school needs adequate financing, quality faculty and qualified students. In seeking to secure these essentials, the new law schools often find themselves competing against each other.

It is unclear whether all the approved Japanese law schools will be able to survive as viable institutions. Japanese universities and their law faculties are intensely competitive. Notwithstanding the fact that existing legal education in

¹⁶⁵ James R. Maxeiner, 1992: High Time For American Lawyers to Learn From Europe, or Roscoe Pound’s 1906 Address Revisited, 15 *Fordham Int’l L.J.* 1, 12-13 (1991). Compare the critiques of Alan Watson, the civilian Scottish jurist turned American law professor: “To an extent unparalleled elsewhere, [American] students are not exposed to systematic treatment of law, with clear-cut concepts, institutions, and rules, but are presented with individual cases, outside of a historical, doctrinal, legal context but against a background of social interests.” Alan Watson, Joseph Story and the Comity of Errors, *A Case Study in Conflict of Laws* 118 n.29 (1992); Alan Watson, *Law Out of Context* 143 (2000) (“Concepts and principles are badly downplayed. So are rules and their authority and stability.”).

Japan is not directed toward producing lawyers, success on the examination for admission to the Institute serves as a measure—perhaps the principal measure—of the quality of a law faculty. Historically just five law faculties—two public (Tokyo and Kyoto) and three private (Waseda, Chuo and Keio)—have accounted for about two-thirds of successful applicants to the Institute. In 2002, each of these had more than one hundred successful applicants; no other law faculty had as many as fifty and most had fewer than ten. When the Reform Report was issued, there was a general expectation that only about twenty new law schools would be created. This number would have corresponded approximately to the number of law faculties that typically have at least ten successful applicants to the Institute.

The number of applications to open law schools was much higher than originally anticipated. Seventy-two applications were filed—all but a handful came from the ninety-three universities that have law faculties. Apparently even universities with few successful candidates for the Institute concluded that in order to be competitive at the undergraduate level, they need to have law schools. Sixty-eight of seventy-two applications were approved. Can all these new law schools survive when only about twenty of their parent law faculties have an established track record of placing graduates in the national Institute, and thus in practice?

1. Controlling and Financing the New Law Schools

While some of the new law schools will be independent institutions, most will be affiliated with universities. That so many universities have chosen to establish new law schools shows substantial societal backing for the new system of legal education and lawyer training. That support is demonstrated in bricks and mortar at a number of schools, including Kansai University Law School, where there are or will be new buildings built just for the new law schools.

Although most of the law schools are graduate schools of their respective universities, they are expected to have substantial independence. They will be administratively separate from the law faculties, they will control their own admissions, and they will grant their own degree, a Juris Doctor (Homu Hakase). The new law schools will not, however, control their own budgets. This may be just as well, since they are not expected to produce surpluses for their universities the way many American law schools do. This lack of financial surplus is, in part, because the anticipated interactive education and the lower student-faculty ratios have led to higher tuition for law schools than is generally the case for other university programs.

Financing of the new law schools is thus a potentially divisive issue. Law schools will be dependent on tuition from their students and on other resources that their universities may make available. The new law schools at public universities have announced low tuitions of about <<Yen>> 780,000 a year (roughly US\$ 8000 at current exchange rates). Private law schools initially considered tuitions in a range of <<Yen>> 1,750,000 to <yen> 2,350,000. Because this is considerably more than the tuition of public law schools, to remain competitive, the private

universities called for government support. It appears that this support will be forthcoming. The Ministry of Education and Science has announced it will provide a subvention so that the tuition at private law schools is no more than <<Yen>> 300,000 above that of public schools. The Ministry will also increase the level of scholarship support available to most students from <<Yen>> 130,000 a month to <yen> 200,000. Pressure to remain competitive with public law schools has led private Japanese law schools to reduce their tuition. In late 2003, most private law schools announced reductions in their tuition of about <<Yen>> 300,000.

2. Obtaining Qualified Faculty for the New Law Schools: the Practitioner Requirement

A strong law school requires a strong faculty. While most faculty members of the new law schools come from the existing law faculties, there has been keen competition for new faculty members. Although decisions on staffing were made locally by committees at the respective universities, the Ministry of Education and Science had to approve these choices. The Ministry imposed a rigorous review of academic credentials. For example, it refused to authorize a criminal procedure professor to teach criminal law because it considers credentials in the one academic area not sufficient for the other. It has also demanded that professors show recent publications in the field they intend to teach. One of the reasons that the Ministry reportedly did not approve the initial application of Osaka University was because one professor of criminal law had only four instead of the requisite five years of teaching experience.

The division of existing faculties into new law school faculty and old legal department faculty has not produced as much dissension as one might have feared. In part, that may be because conditions of employment are to be similar at the law faculties and the law schools, and it is not yet clear which, if either, will be preferable. Faculty members who teach more philosophical subjects, such as legal history and jurisprudence have tended to opt for the law faculties, while faculty members who teach subjects closer to practice seem to have gravitated to the law schools. Because most law school faculty members are to be coming from the existing law schools, the creation of employment and tenure standards apart from the university generally has yet to receive top priority. Most law schools are expected to begin developing separate standards, if at all, only after they begin operation. Here much remains open.

The most substantial challenge in faculty recruiting has been meeting the requirement that at least one-fifth of each new law school's faculty must come from practice. The Reform Report—noting the role of legal education as a bridge between theoretical and practical education—considers the participation of practitioner-teachers to be “indispensable.” It calls for setting qualifications for professors that consider “to a large degree” the professor's “capacity and experience as a practitioner.”

Some law schools had difficulty locating suitable professors from practice;

some may have difficulty retaining sufficient numbers of such faculty. In Japan, public servants such as judges and prosecutors can earn more than << Yen>> 25 million a year, that is, in excess of US\$ 200,000. To facilitate placing professionals in the new law schools, the Ministry of Justice in cooperation with the Supreme Court established a system to send prosecutors and judges to the law schools for three-year terms. The law schools will provide the usual funds for professors and the state will make up the difference. Because there is no comparable system to send private lawyers to the law schools, it may be more difficult to engage competent private practitioners. One practitioner acerbically described how he sees the problem: “good practitioners are usually too busy to teach at law schools, while bad ones are not capable of teaching.”

There is concern whether all of the new Japanese law schools will be able to provide adequate practical instruction even with the requirement that twenty percent of the faculty come from practice. Some legal educators fear that requirement may be insufficient, and that present faculty members will be unable to provide the needed instruction. Very few legal academics have experience in legal practice. Despite faculty members’ lack of experience, however, pessimism that existing law faculty members are not themselves able to teach professional legal skills seems unwarranted. After all, in the United States, law school education completely supplanted law office education by using law professors who had no practical experience. Difficulties in staffing the new Japanese law schools may ultimately depend upon whether the law schools focus on the professional aspect of “thinking like lawyers” or on more technical practice skills.

3. Obtaining Qualified Students for the New Law Schools

A concern of many Japanese legal educators about the law schools is whether they will be able to obtain a sufficient number of high quality students. Because a school’s prestige—and therefore its ability to attract students—is likely to depend on its success in placing graduates in the national Institute, it is imperative that a new law school enroll students likely to pass this exam. This is all the more important now that it appears that fewer than half of law school graduates will be admitted to the Institute. Of the 5000 to 6000 students who are to begin studies on April 1, 2004, no more than 1500 are to be selected for the Institute in 2006.

Japanese law schools will likely focus on admission requirements to ensure the selection of competitive students. Two different bodies have created and are administering standardized law school admissions tests. In addition, the law schools are supplementing the standardized tests with their own examinations.

If the experience of the Kansai University Law School is typical, admission to better schools will be highly competitive. Kansai had 1638 applications for its inaugural class. Of all the new law schools in the Kansai region, that was the highest number of applications. From the 1638 applications, it selected about 890 persons for its own supplementary examination. From that number it chose 130

persons for the entering class.

The new Japanese law schools are already discovering some of the techniques employed by American law schools to maximize their success rate on the bar exam: granting scholarships to the very best students and providing loans to good students. They may also eschew the shortened two-year plan lawfully allowed to students with undergraduate degrees in law and require all or most students to take a three-year program.

5. CONCLUSION

We began this Article noting that April 1, 2004 was a remarkable day for legal education. Will that day be remembered as the Japanese springtime counterpart to the fall day in 1870 when the United States began its “revolution in legal education”? It is too early to tell. That American revolution, in any case, took a generation to triumph. We expect that it will be many years before the results of this Japanese revolution are clear. It is, however, already apparent that within less than a generation, law school-trained lawyers in Japan will account for the majority of Japanese lawyers.

The new Japanese law schools individually face many difficult challenges, but collectively they have an enormous opportunity to shape not only the new form of legal education, but also the spirit of Japanese law. We hope that they are able to adopt the best features of American legal education, such as strong teaching of analytical skills and a high level of personal interaction, without giving up the best features of Japanese legal education, such as the explication and teaching of law as a systematic body of legal rules. There is reason to believe that the new law schools can achieve this ideal. When the United States adopted the case method of legal instruction, existing university legal education was weak and was without a strong tradition of academic law. However, there was a strong practicing bar. In Japan, on the other hand, the professors of the new law schools are coming mostly from an academic tradition; the practicing bar is small. We can count on these professors to retain the academic strengths of Japanese law. We hope that they will perceive the essence of professional education, that they will develop that education in new ways that unite law and practice, and that they will find the median between legal education and practical training. One day, just as Japanese legal educators now seek to learn from foreign and especially American experiences, foreign legal educators may seek to learn from Japanese experiences.

6. NOTES AND QUESTIONS

1. Do you note a trend in the influence of American law schools and legal education around the globe?

2. Did the descriptions of U.S. legal education found in these readings make sense to you? Do they conform to your experience here at U.F.? Do they conform to your expectations before coming here? Do they conform to what you think should be the goals of U.S. legal education?

3. Do you find the discussions of political and class concerns in some of the readings surprising? Why or why not?

4. What did the readings tell you about your own system of legal education? Do you look at your own legal education differently after these readings? How?