

Paper for 2008 IALS Programme on Effective Techniques for Teaching About Other Cultures and Legal Systems

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Teaching Comparative Law in the Post-Conflict Context

The idea that comparative law is useful for law students generally is well-established.¹ Indeed an understanding of comparative methodology is said to help in matters which range from the prosaic – how to better aid a client in a contracts dispute with a party in another jurisdiction – to broader notions of Europeanisation or Internationalisation of private law, transjudicialism and transnational legal processes. And, while there is no single correct approach to teaching comparative law, there are broad areas of consensus – at least among comparativists themselves – about how comparative law should be taught. For example, it is now commonplace that a contextual approach which takes into account legal cultures is a necessary part of any comparative methodology. This paper takes those well-established uses and teaching methods for granted but seeks to transpose them out of the context of stable societies where they have been most often discussed and into the unstable, and specifically post-conflict scene where an analysis of the uses of comparative law is in a fledgling stage.² It argues that comparative law is not only useful in the post-conflict environment but is in fact an urgent need in terms of promoting curricular and indeed social reconstruction. It also outlines some of the special considerations which should be borne in mind when teaching from a comparative perspective in this context.

The Impact of Conflict on Legal Education

One obvious way that war impacts on legal education is in terms of ‘bricks and mortar’. Teaching facilities, libraries and academic records may be damaged or destroyed. Another obvious impact of war is on personnel. Law teachers, students and administrators may be killed or injured or forced to migrate. When war does end, casualties, dislocation and traumatic experiences ensure a host of difficult psycho-social issues. While dealing with grief, anxiety and anger is at the forefront of people’s minds (while some repress war memories), the conflict may also serve as a defining moment for the university and its population. Indeed war experiences are often enshrined in monuments. For example, a plaque outside the Law Faculty at the University of Sarajevo states: “To all the students and workers in the Sarajevo Law Faculty killed in combat and in workplaces during the war of liberation and defence. They gave their lives for defending the independence,

¹ K. Zweigert & H. Kötz (trans. T. Weir), *Introduction to Comparative Law* (Oxford: Clarendon Press, 1998) at 21-24.

² For a review of the limited literature – and some reflections on the author’s experiences with post-conflict legal education in the Balkans and Caucasus - see C.P.M. Waters, *Reconceptualising Legal Education After War* (2007) 101 *American Journal of International Law* 382.

integrity and sovereignty of Bosnia and Herzegovina.”³ As well as remembering the dead, such monuments – commonly built in British and Commonwealth universities following the First and Second World Wars - can celebrate heroism, victory (or loss) and imbue the rebirth of universities after war with heroic, almost mythical qualities.⁴ Indeed, in wars education is often seen a “second front” and attempts to maintain normalcy are seen as heroic and patriotic.⁵ How staff and students stand down from this battle after conflict, however, and how pedagogical patriotism can be squared with social reconstruction, is a very real question.

Less obvious than the direct physical and human impact of war is the impact on the law school curriculum. It is an obvious point perhaps, but war changes law and law schools must grapple with these changes. This applies even to victorious parties. The allied powers in World War II, for example, saw topics such as administrative and international law emerge in importance and demand a place on the curriculum after the war. Of course, change will be most drastic for the “losers” and in cases of wholesale regime change or international intervention. It should also be noted that post-conflict law brings with it certain legal problems which may never have been dealt with in peacetime and for which expertise – including comparative and international law knowledge - is lacking. These include war crimes trials and property restitution for returning refugees and internally displaced persons. The question asked in the next section is, given the tremendous physical, human and programmatic impact of war, can law schools successfully recover?

Can law schools recover?

While there are of course important variables – including the existence of a secure environment and the amount of international assistance – there are numerous examples where law schools have technically reconstructed in terms of rebuilding the physical plant and getting enrolment back up (indeed post-war enrolment often exceeds pre-war enrolment). Unfortunately, it is harder to find law schools which have done a good job with respect to social reconstruction, at least in the context of ethno-political conflicts.⁶ Indeed law departments often hamper larger reconstruction or reconciliation efforts. They may do so in several ways which range from discrimination in admissions to a broader failure to inculcate a culture of peace and reconciliation.⁷ One of the failings in terms of the latter issue is chauvinism in the selection and presentation of substantive law taught.

³ The memorial is dated 6 April 2002, author’s observations, January 2005.

⁴ War memorials in the Anglo-American world – including those located in universities – are the subject of extensive scholarship; see, for example, M. Connelly, *The Great War, memory and ritual : commemoration in the city and East London, 1916-1939* (Woodbridge: Royal Historical Society/Boydell Press, 2002).

⁵ See for example, D.M. Berman, *The Heroes of Treca Gimnazija: A War School in Sarajevo, 1992-1995* (Lanham: Rowman & Littlefield, 2001) at 7.

⁶ Social reconstruction has been defined as “a process that reaffirms and develops a society and its institutions based on shared values and human rights.” It calls for a broad range of activities to address the factors which led to conflict in the first instance. See H. Weinstein & E. Stover, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: CUP, 2004) at 5.

⁷ On peace culture, see D. Adams, *UNESCO and a Culture of Peace. Promoting a Global Movement* (Paris: UNECO, 1995).

Scholars of nationalism and conflict have for some time identified how historical narratives can promote difference and particularized identities. These narratives entail myths of ethnic, religious or linguistic purity, ethnogenesis (which people was there first) and superior civilization.⁸ Myths of victimization also make an appearance as the excesses of one's own side are forgotten and "cultural life is directed to broadcast the injuries carried out against us".⁹ In such cases, those who peddle ethnic or nationalist myths seek to essentialise and reify a certain identity and in turn to exclude others from that identity. Myth peddlers are often historians, politicians, journalists and writers. Unfortunately, lawyers and law teachers also join those ranks.¹⁰ Law, of course, can be a cultural marker as much as folklore, a flag or an anthem. And this is not necessarily a bad thing, even where there is an ethnic connection. Attachment to the Quebec or Scottish legal systems, for example, can help sustain a healthy legal diversity in the world.¹¹ It is often forgotten, however, that law as an identity badge can also serve to exacerbate conflict. It can be a symbol or an instrument of division in ethnic conflict, and not only where law is discriminatory or blatantly contrary to international norms as in an apartheid regime, but, in some circumstances, in the promulgation of ordinary legislation such as a civil code. Law as a cultural marker can, like folklore or language, be manipulated into a divisive force.

There is a discernible pattern in ethno-political conflict in how law is used and how it is taught. For example, law departments in South Ossetia (which *de facto* split from Georgia in the early 1990s) teach only Russian law, as that self-declared Republic wishes to join the Russian Federation. No attempt is made to teach Georgian law or to teach law in the Georgian language. This is despite the fact that some ethnic Georgians continue to remain in South Ossetia and that a negotiated settlement with Georgia is the only long-term solution to the conflict. The same is true in Nagorno Karabakh (which broke from Azerbaijan in the early 1990s) where only Armenian law is taught. The foundational documents of many would-be independent states reaffirm the message that the existence of statehood is based on ethnicity, even though these provisions exist side-by-side boilerplate liberal constitutional clauses. For example, the Constitution of South Ossetia declares that the Republic is "building its relations with the Republic of North Ossetia-Alania on the basis of ethnic, national and historical-territorial unity and socio-economic and cultural integration."¹² Similarly Nagorno Karabakh's independence declaration recalls the "Armenian people's striving for unification as natural and in line with appropriate norms of

⁸ See G. Smith *et al*, eds., *Nation Building in the Post-Soviet Borderlands: The Politics of National Identities* (Cambridge: Cambridge University Press, 1999).

⁹ C. Hedges, *War is a Force that Gives us Meaning* (New York: Random House, 2003) at 64.

¹⁰ Though rarely are nationalist teachings so explicitly imported into the legal curriculum as in Nazi Germany, where the three year law programme "was modified to incorporate coverage of the cornerstones of National Socialist thought; race, soil, blood, Teutonic history and folklore." [M. Lippman, "The White Rose: Judges And Justice In The Third Reich (2000) 15 Conn. J. Int'l L. 95 at 109].

¹¹ On links between cultural identity and globalised law see N. Kasirer, "Lex-icographie mercatoria" (1999) 47 Am. J. Comp. L. 653. On "sustainable diversity in law" see H.P. Glenn, *Legal Traditions of the World* (Oxford: Oxford University Press, 2000) at 333.

¹² Article 8 of the *Constitution of the Republic of South Ossetia* (8 April 2001) [unofficial translation on file with author].

international law”.¹³ It appears law teachers involved in these ethno-political conflict rarely express a critical view of such legal instruments, at least on their “own side”. Needless to say, this legal chauvinism is mirrored in the law schools of Georgian and Azerbaijan, where the legal principles on self-determination for aspirant peoples are downplayed.

Even where a legal order is somewhat fixed, as in Bosnia following the 1995 Dayton Agreement, the emphasis of teaching in law departments can fail to recognize that legal order. Thus it is reported that Bosnian law departments de-emphasize state level constitutional law or legislation, and focus instead on the entity level and specifically the three de facto territories –Bosniac, Serb and Croat - the Federation, Republica Srpska and Brcko.¹⁴ In the Bosnian city of Mostar, there are two law departments, one ethnic Bosniac and the other ethnic Croatian. Despite their proximity to each other, the two departments generally avoid contact and rather seek contact with ethnic confreres in more distant Faculties.¹⁵ Similarly at the University of Banja Luka, an ethnically Serb law department ‘imports’ visiting lecturers from Serbia, rather than looking to, for example, the better staffed but ethnically Bosnian University of Sarajevo.¹⁶

Law in these ethno-territorial examples is used as a proxy and metaphor for continued ethnic conflict and continued “resistance”. Not only are the foundational documents of new or would-be states (declarations of independence, referenda results and so forth) stressed as being legal and natural, the disappearance of prior laws is also seen as progressive (being the laws of the “occupier” for example). In these cases, nationalist legal visions are reified and legal pluralisms denied. In much the same way as myths are spread about language (the disintegration of Serbo-Croatian along with the disintegration of Yugoslavia) and history (myths of victimization), law serves as both a symbol and an instrument of division.¹⁷ As one author studying ethnic conflict in Sri Lanka puts it: “At the heart of ethnic conflict is a belief in the existence of cultural and ethnical purity, and a concomitant fear of mixing and borrowing. Hybridity...has to be suppressed and becomes the site of anxiety.”¹⁸ Unfortunately, once this reification of culture, ethnicity, race or religion takes place – manifested through law and other social sites - it becomes difficult to stand down without losing face.

¹³ *Declaration on the Proclamation of the Nagorno Karabakh Republic* (2 September 1991) [unofficial translation on file with author]. The passing of “laws” can be a powerful symbol, even when there is not only no *de jure* right to pass the law but also no *de facto* power. A good example is the proclamation of a constitutional law for a “Republic of Kosovo” in 1990 by Albanian members of a provincial assembly, acting in secret [N. Malcolm, *Kosovo: A Short History* (NYU Press, 1998) at 347.

¹⁴ On the “fragmented” nature of legal education in Bosnia, see International Crisis Group, “Assessment of Legal education in BiH”, a document prepared for the Independent Judicial Commission in March 2002 [copy on file with author] and Council of Europe and European Commission, *Law Faculty Review in Bosnia and Herzegovina* (2004).

¹⁵ *Law Faculty Review, ibid.*, at 38. This is not surprising given ethnic splits in ‘feeder’ schools.

¹⁶ Interview with an ABA-CEELI Liason Officer in Bosnia on 24 January 2005.

¹⁷ G. Smith, et al., *supra* note 8 and Hedges, *supra* note 9 at 32-33.

¹⁸ N. Silva, ed., *The Hybrid Island: Culture Crossing and the Invention of Identity in Sri Lanka* (London: Zed Books, 2002) at i.

Bringing in Comparative Law

Even with this thumbnail sketch of the impact of war on law schools and the generalised failure of law schools to contribute to social reconstruction, the role for comparative law should be self-evident. First, comparative law can provide a vehicle to discuss notions of pluralism and respect for other cultures. Second, it can draw students and faculty away from a parochial, nationalist, essentialist ('law is...') focus and towards broader notions about legal convergence (or simply respect or comity), comparative constitutionalism and transnational legal processes in the human rights and other arenas. Few, however, have recognized the link between comparative law and recognitions of legal diversity on the one hand, and peace on the other, though as the noted comparativist Patrick Glenn (a Montrealer it should be pointed out given our pluralistic host city) notes, "[a]cting positively to sustain diversity in law should improve communication between lawyers of the world. It should enhance the prospect for peaceful settlement of disputes, enhance the legal mission."¹⁹ This diversity in legal learning requires a cosmopolitan approach to law, with comparative law and international law at its heart, and every effort should be made to ensure that these subjects are on the post-war curriculum. It is heartening to note that the International Association of Law Schools (IALS) has implicitly enshrined some of these principles in its Charter. Thus the Mission of IALS includes the goal of "foster[ing] mutual understanding of and respect for the world's varied and changing legal systems and cultures as a contribution to justice and a peaceful world" as well as "contribut[ing] to the development and improvement of law schools and conditions of legal education throughout the world".²⁰

How precisely comparative law should be introduced to a post-conflict law school – materials, teaching techniques – is a matter for another paper and further research, but in closing I would stress that post-conflict education should not be unduly pathologised. As one expert on education and conflict puts it: "there are grave omissions – or contradictions – in the curricula of both stable and conflictual societies, omissions which contribute to a continued acceptance of war."²¹ Outsiders engaged in legal education reform after war must be aware that seemingly stable societies have not got it all right. One need think only of the neglect in some Canadian common law departments of this country's bijural traditions or the fact that in many British law schools comparative law is not even on the curriculum, to realise that pluralism is not yet embedded into the fabric of legal education in the western world. As in all legal and social reconstruction efforts, the importance of humility on the part of outsiders must be underlined.

¹⁹ Glenn, *supra* note 11.

²⁰ Charter of the International Association of Law Schools, Section 1 (a) and (d), 18 August 2005.

²¹ L. Davies, *Education and Conflict: Complexity and Chaos* (New York: Routledge, 2004) at 5.