

**COMING TOGETHER IN THE LEARNING PROCESS:
USING OUR SYSTEMIC WEAKNESSES AS PEDAGOGICAL TOOLS**

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Attempts to teach law to foreign students often confront a variety of obstacles.¹ Sometimes these obstacles are a product of the conceptual models originally incorporated within the major classical legal traditions: Civil Law and the Common Law.² In Western law schools, a small space in the curriculum may have been reserved to the Shariah, the sacred Law of the Muslim world. Paradoxically, that small space, due to events which have come about as a result of the 2001 incidents in the Twin Towers, may be gaining more immediate visibility nowadays. Muslim studies are now the order of the day in major universities of the western world and, through them one could also find an increasing interest in Muslim Law.³

The conceptual models and legal traditions in which lawyers have been trained are quite resilient and, to a limited extent, impervious to the introduction of new, different or alternative conceptual models. They have been assumed as part of the basic foundations underneath the prevalent social structure. They are both an integral part and a product of the social structure, as well as a factor which defines the nature of that social structure itself. In effect, law has a constitutive role in society. Any attempt at trying to introduce new outside norms in societies built upon any of those conceptual models will be confronted by the presence of preexistent

¹ One of the major one is the role of culture and language and its relations to the study of law in a classroom. See Gloria M. Sánchez A. Paradigm, Shift in Legal Education. Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture and Legal Language of the Major U.S. American Trading Partners. 34 San Diego L. Rev. 635, at 645 (1997).

² For a description of some of the problems emerging from those conceptual models see Harold T. Berman and Charles J. Reetz Jr., Roman Law in Europe and the Jus Commerce: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century, in Syracuse J. Int'l. L. and Comm'l 20-24 (1994). See also John Henry Merryman, David S. Clark, Comparative Law: Western European and Latin-American Systems (Indianapolis, 1978). From the point of view of legal practice, see H. De Vries, Civil Law and the American Lawyer 7 (1976).

³ The University of Puerto Rico itself now reached an agreement with the University of Granada in order for our students to obtain graduate degrees in Muslim studies.

norms, no matter the way through which those preexistent norms have gained social acceptance in society.⁴

During the last decade and a half, our Law School has been frequently involved in legal reform projects in Latin America. Puerto Rico, then, a mixed jurisdiction (Civil and Common Law) as a result of the transfer of sovereignty (from Spain to U.S.) which took place in our country at the end of the Nineteenth Century,⁵ was looked upon as an attractive forum for countries which have recently moved toward orality.⁶ Most of the groups that we received as part of those projects were Spanish speaking and had a French or German Civil Law tradition in its background. Language was not supposed to be an obstacle for their learning process in classrooms or in our local courts. That, however, was not always true. On many occasions concepts differed in their meaning although the same word was being used to define them.⁷

But even beyond that, though we still call ourselves a Civil Law jurisdiction, the truth is that we behave in many ways and to a great extent as Common Law lawyers do. Our legal education in our law schools is strongly influenced and is mostly organized around case precedents even in the Civil Law subject matters.⁸ We probably were more aware than most other US jurisdictions of the way a Civil Code helps in drawing conceptual maps for lawyers in their societies, but our judges, particularly at our lower court level, probably felt less constrained than the foreign state judges by positive codes and legislation.

⁴ For a recent and dramatic description of an attempt to adopt a US-based legal skills and legal writing pedagogy to the South African continent and how it ended, see, Brook K. Baker, *Teaching Legal Skills in South Africa: A transition from Cross Cultural Collaboration to International HIV/AIDS Solidarity*, 9 *Legal Writing J.*, 145 (2003).

⁵ For a detailed explanation on the transfer of sovereignty and its effects on the judicial system of Puerto Rico, see, José Trías Monge, *el Sistema Judicial de Puerto Rico*, pp. 45-50, 10

⁶ It was my experience that those changes sometimes came about as a result of diverse types of pressures from both international institutions and sometimes by the U.S. State Department.

⁷ The word jurisdiction itself has had a confusing meaning in our own jurisprudence. When a Chilean visits the island and hear us talking about “our jurisdiction” he or she had difficulty understanding what we are talking about. For him it is a “foreign” concept. Are we talking about competence or territorial factors? The same thing happens with our use of the word “audiencia” (oral hearing) which in Spain may mean a particular appeal level.

⁸ See Héctor Laffite, *The Role of the U.s. District court in the commonwealth of Puerto Rico*, 28 *Rev. D. Puertorriqueño* 33 (1988).

What I find even more interesting, our visitors seemed to have a preference toward clear cut, absolute views of Justice, based more on Classical philosophy, while we tended to behave under more pragmatic instrumentalist notions of justice. In the criminal procedure field no issue was more contentious whenever our visitors went to court hearings than the dynamics of plea-bargaining, which posed for them controversial notions of justice which were almost always rejected in advance by those groups. Their arguments went as follows: If the law establishes as a crime a particular conduct and imposes punishment for its violation, why should the state be negotiating what the legislator has already mandated?⁹ Our answer of course was always based on external factors; not on internal elements present in the determination of guilt. It was the only pragmatical way, we argued, that we had to serve the interests of justice as well as procedural guarantees. From our perspective, if every case in our jurisdiction would have to be litigated to the end, and everyone would have its day in court, calendars would be impossible to manage and justice will be greatly delayed.

Of course, on many occasions it was the backlog in their own court calendars that had served as an incentive for them to look at our system. Many of us, looking at the problem from our side of the fence, believed that any reform project to be successful would had to incorporate some form of plea bargaining negotiation, otherwise the calendar congestion problems will remain. Yet, at the same time such exchanges made us aware of the ways in which our system, through the adoption of increasingly pragmatic policies has distanced away from the classical philosophical premises which were the main building blocks for our concept of justice.¹⁰

That brings us to what in effect was the principal question of this exercise. I find that the most effective technique in helping us teach foreigners about our legal institutions is to first abandon all notions of superiority regarding ours ways. Let us try to explain to them how they really work, with all their positive and negative characteristics. Let us avoid any pretense of salesmanship, and let us be aware that many of the institutions which we praise so much today as part of our heritage may have come about as a result of very despicable historical events. In our case in Puerto Rico many of the institutions we talk to others about, have come into being in the

⁹This resistance was evident in all groups coming from Latin America. Of all the groups it was probably more clearly articulated in the early 1990's by a group of Colombian prosecutors during a closing session, after a three week training funded by AID.

¹⁰ For a broader perspective on the question of justice, see Anthony D'Amato, *Rethinking Legal Education*, 74 *Marquette L. Rev.* 1 (1990).

island as a result of war and aggression, and yet we still find them useful today and have incorporated them as positive elements of our legal structures.

A second consideration that I will like to bring forefront is the need for a certain awareness toward differences in social structures, both on the countries those foreigners come from and ours. This is a quite sensitive issue because it formulates some fundamental questions regarding the validity of universal or relative perspectives which at the same time will probably help to sustain contemporaneous positions regarding the nature of rights. I will introduce just one example.

I have argued for a long time that the nature of the judicial function and the role of a judge is played differently in different cultural contexts.¹¹ In our system we tend to rely a lot on the figure of a neutral judge. It is a judge which plays a less active role at the investigative stage, but which also plays a major role in the constitutional structure, to the extent that he may declare the law created by the legislature unconstitutional. In our adversarial system his role is supposed to be restricted. It is a complex figure. Is that figure operating similarly in every contextual situation within the US territory? I will say no. There are many ways in which that image may be compromised in a small island society such as ours, even within the context of the major federal jurisdiction. In a society where everyone seems to know each other, be related to each other, and everyone seems to be part of each other circle, that neutrality may be always questioned. Particularly when each of those relations encompasses a number of social obligations toward others and expectations of others regarding those obligations. But it is not only the judge which is subject to those pressures. Any individual in a position to take decisions is similarly subjected to these kind of social pressures in such an environment.

Why have I selected this example regarding techniques of effective teaching? I have done so because I believe that by opening up to a more transparent conversation about our own social structure, foreigners from some developing countries or from similar Latin American societies may be able to find in it similarities through which they could start a more solid pedagogical process of learning. They will be able to familiarize not with the “ideal type”, that they may find falsified and never attainable, given their own social structures, but will work out from the real

¹¹ See, Roberto P. Aponte-Toro, Derecho, Estructura Social y ‘Ética Moderna, Ethos Gubernamental V.I, No. 3, p. 153

complexities which in effect may result more familiar and accessible to their process of learning.

I hope that this short reflection will be useful in the context of our Montreal discussion.