

“COMPARATIVE LAW” AND 21ST CENTURY LEGAL PRACTICE

An Evolving Nexus

This commentary notes that the demands of modern practice are changing under the stress of “globalisation” as manifested in the increased velocity of communication and commerce and the greater mobility and interconnectedness of individuals. National legal systems and the lawyers and judges administering them are destined to interact with alien legal systems of a national, regional, or supra-national nature in a number of multi-faceted ways. Such trends and developments are exerting a profound effect on the legal environment in Asia. The question then arises as to how legal education should respond to these developments. This commentary argues that the traditional doctrinal curriculum must be balanced by offerings that enhance the perspective of young lawyers and practitioners by instilling in them a practical appreciation of comparative issues. Rather than emphasising rules *per se*, the comparative approach described in this commentary is designed to sensitise students to the forces shaping the modern practice environment while also giving them an appreciation of the fundamental grammar of external legal systems and of the expanded universe of options for problem-solving. The evolving legal environment will reflect a number of asymmetric interactions between the domestic courts and private dispute resolution fora, the state and regional bodies, and finally between the state and supra-national instances and instrumentalities. This commentary suggests that modern legal training must incorporate these complex dimensions of practice into the curriculum by adopting a broader notion of “curriculum” in general and a more flexible view of what we mean by “comparative law” in particular.

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I. Introduction – Comparative law and the education of a 21st century lawyer

1 During the last 25 years, a recurring debate has developed as to how best to adapt and modernise the manner in which we train our lawyers amid a rapidly evolving international environment characterised by accelerating trade flows and the proliferation of international trade treaties, an alphabet soup of international and regional agencies and organisations charged with managing everything from climate change to intellectual property, and a resulting focus on the often used, but somewhat less frequently defined, term of globalisation.¹ The increasing mobility of lawyers, the evolving contours of the international legal environment, and the resulting implantation and transnational integration of international law firms in financial and commercial centres, such as Singapore, Hong Kong, London, New York, and Shanghai will reinforce diverse forms of cultural and legal crossovers, thereby crystallising “globalisation” in the legal profession.²

2 To what extent, and if so, how, should legal education respond to these developments in order to become more “international” or “internationalised”? A distinction between the above two terms can perhaps be made here, with the former relating to actual transnational legal instruction in one or more specific national systems and the latter implying a more general awareness, appreciation, and understanding of the similarities, differences, and nuances across systems and of the transnational forces shaping the international legal and practice environment. Many law school curricula in Europe, North America and Asia attempt to address these different dimensions with specific courses in, say, Chinese law, paired with broader offerings in comparative law.³ Is this a viable approach, particularly as it relates to a free-standing course in comparative law, and therefore a laudable endeavour or a false lure, consuming too much time and too many resources for too limited a yield? Nowhere is this issue more relevant than in Asia, a region shaping

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1 See Larry E Ribstein, “Practicing Theory: Legal Education for the Twenty-First Century” (2011) 96(5) ILR 1649; Mortimer Sellers, “The Internationalization of Law and Legal Education” in *The Internationalization of Law and Legal Education. Ius Gentium: Comparative Perspectives on Law and Justice* vol 2 (Jan Klabbbers & Mortimer Sellers eds) (Springer, 2008) at pp 1–7 and Alfred S Konefsky & Barry Sullivan, “There’s More to the Law than ‘Practice-Ready’” (2011) 58(10) *Chronicle Of Higher Education* at A30.

2 See also Simon Chesterman, “The Globalisation of Legal Education” [2008] Sing JLS 58.

3 See, for example, the curriculum of City University of Hong Kong, School of Law at http://www.cityu.edu.hk/slwleng/academic/postgraduate_llm.html (accessed 22 February 2012) and the curriculum of University of California, Davis, School of Law at <http://www.law.ucdavis.edu/news/news.aspx?id=3436> (accessed 22 February 2012).

and being shaped by the evolving international environment and one which is destined to be at the forefront of global trends for years to come. How far should the curriculum stray from classic, domestic doctrinal courses, such as property, tort and contract, by including courses on comparative law or interdisciplinary offerings on law and economics or law and regulation? What does a lawyer in the 21st century need to know in order to enhance his or her effectiveness in light of the evolving international environment and to what extent are law schools responsible for furnishing this knowledge base? Is the endeavour primarily institutional or individual?

3 This commentary will focus on comparative law in particular, while offering some reflections on modern legal education in general. To be sure, law schools in the US⁴ and Europe⁵ are grappling with similar issues, but the Asian experience is perhaps somewhat unique in terms of degree due to the clear and present nature with which global forces are rapidly exerting daily pressures on the contours of everyday life. US legal education continues to address this problem, but from a position as a legal Goliath, given its still preponderant, albeit diminishing, weight in global commercial and legal affairs. It is clear that different nodes of legal education are developing. Europe, propelled by the forces of regionalisation, has had to confront the notion of the globalised lawyer in practical, collegial terms, but this has occurred largely within the framework of the European Union (“EU”) and with a distinctly private international law focus.⁶ The civil law tradition, which informs the structure of many international treaties, has also perpetuated and fostered European student interest in public international law, with many postgraduates focusing on these issues. Within this matrix, the United Kingdom has begun to carve out a role as a common law bridge to the civil law tradition, participating in the shaping of institutions and resulting EU jurisprudence.⁷ Asia’s increasing importance in international commerce and growing regional integration will also necessitate heightened attention to, and the resulting development of, different approaches to transnational issues and law teaching.

4 See, for example, Hugh J Ault & Mary Ann Glendon, “The Importance of Comparative Law in Legal Education: United States Goals and Methods of Legal Comparisons” (2005) 27 J Leg Ed 599.

5 See, for example, Norbert Reich, “Recent Trends in European Legal Education: the Place of the European Law Faculties Association” (2002) Penn St Int’l L Rev 21 at 29.

6 Franz Werro, “Notes on the Purpose and Aims of Comparative Law” (2001) 75 Tul L Rev 1225. See also Anne-Catherine Hahn, “The Harmonization of European Private Law Systems and the Role of Comparative Law” (2002) 30 Int’l J Legal Info 265.

7 Margaret McCown, “The Use of Judge-made Law in European Judicial Integration: Precedent-based Arguments in EU Inter-institutional Disputes” (2001) Paper presented at panel on “The European Court of Justice and the Integration of Law” available at <http://aei.pitt.edu/2141/1/002191_1.PDF> (accessed 22 February 2012). See also Giacomo A M Ponzetto & Patricio A Fernandez, “Case Law *versus* Statute Law: An Evolutionary Comparison” (2008) 37(2) JLS 379 at 383.

II. Legal training and legal practice

4 Legal training must bear a rational relationship to legal practice. As the contours of the latter change, so, too, must the former. It is clear that the development of core analytical skills, coupled with a traditional basket of doctrine, the legal tool box, must anchor the curriculum. However, as Ward Farnsworth notes:⁸

[L]aw school is carved up the other way around: by legal topics ... not by tools. Law tends to be taught, in other words, as if legal rules were the most important things one could learn, and as if the tools for thinking about them were valuable but secondary – nice to know if someone happens to explain them, but nothing urgent.

5 Domestic instruction in tort, contract, and property law, perhaps supplemented by an increasingly broad palette of skills-based courses, such as negotiation and mediation and legal research and writing, will endure. However, as cross-border trends manifest themselves in all forms of legal practice, the question arises as to how one can integrate an exposure to, and an understanding of, these developments into a “traditional law” curriculum to lay a foundation for practical, real world problem-solving.⁹ Can one add an operational understanding of “globalisation” to the legal “tool box” and do law firms care? It is suggested that the answer to both is affirmative.

6 With regard to “globalisation,” it is precisely in defining this phenomenon through a legal lens that value and perspective can be added to a legal education.¹⁰ A thorough discussion of globalisation requires an examination of this trend as both an economic and a social phenomenon. The former will lead to a discussion of the drivers and manifestations of economic globalisation in the form of trade flows, international instruments, and regional groupings, such as the European Union and ASEAN. Bilateral investment treaties, together with broader commitments, such as the undertakings embodied in the World Trade Organization, will interact with domestic regimes in a number of ways, including the interpretation of “non-discrimination” provisions and

8 Ward Farnsworth, *The Legal Analyst: A Toolkit for Thinking about the Law* (The University of Chicago Press, 2007) at pp vii–viii.

9 See, for example, Ralf Michaels, “Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law” (2009) *Am J C L* 765.

10 See Larry E Ribstein, “Practicing Theory: Legal Education for the Twenty-First Century” (2011) 96(5) *ILR* 1649; Mortimer Sellers, “The Internationalization of Law and Legal Education” in *The Internationalization of Law and Legal Education. Ius Gentium: Comparative Perspectives on Law and Justice* vol 2 (Jan Klabbers & Mortimer Sellers eds) (Springer, 2008) at pp 1–7 and Alfred S Konefsky & Barry Sullivan, “There’s More to the Law Than ‘Practice-Ready’” (2011) 58(10) *Chronicle of Higher Education* at A30.

their application to domestic laws and regulations,¹¹ the rights of sovereign states to protect the public welfare, and the relationship of diverse, specialized dispute resolution fora to the national courts. Trade-related aspects of intellectual property rights (“TRIPs”) undertakings have already manifested themselves in defining the scope and protections afforded by domestic patent law in South Africa and India, regarding the manufacture of previously patented drugs for AIDS.¹² The government of Australia currently finds a recent law, requiring generic packaging for cigarettes, challenged by the tobacco giant Philip Morris in both the domestic courts as an unconstitutional taking and simultaneously in investor-state arbitration pursuant to a bilateral investment treaty concluded between the Australian government and Hong Kong.¹³ Such multi-faceted situations are only the beginning as the development and protection of intellectual property rights and other trade-related issues move to the forefront in the high velocity age of Internet and commercial traffic.

7 Other instruments, such as the Convention on the International Sale of Goods (“CISG”),¹⁴ designed to unify international sales law, can take what appears to be a matter of domestic law and transform it into a matter of private international law. Woe to the lawyer in a signatory country who fails to realise that in the absence of a specific opt out provision, the CISG and its somewhat unique amalgam of civil law-common law concepts will apply.¹⁵ With increased migration, even issues of family law, traditionally the province of domestic law, are likely

11 Julia Ya Qin, “Defining Non-Discrimination Under the Law of the World Trade Organization” (2005) 23 B U Int’l L J 215 <<http://www.worldtradelaw.net/articles/qinnondiscrimination.pdf>> (accessed 23 February 2012).

12 See, for example, Edwin Cameron, “Patents and Public Health: Principle, Politics and Paradox” (2004) Paper presented at the Inaugural British Academy Law Lecture held at the University of Edinburgh (Tuesday, 19 October 2004) <<http://www.law.ed.ac.uk/ahrc/script-ed/issue4/cameron.pdf>> (accessed 23 February 2012); William W Fisher III and Cyril P Rigamonti, “The South Africa AIDS Controversy: A Case Study in Patent Law and Policy” (2005) *Harvard Law School, The Law and Business of Patents* 1 <<http://cyber.law.harvard.edu/people/ffisher/South%20Africa.pdf>> (accessed 23 February 2012); Nishith Desai, “International Trade Law: The Indian Perspective” (2008) 36(2) *International Journal of Legal Information* art 18 <<http://scholarship.law.cornell.edu/ijli/vol36/iss2/18>> (accessed 23 February 2012).

13 BBC News, “Philip Morris sues Australia over cigarette packaging” (21 November 2011) <<http://www.bbc.co.uk/news/world-asia-15815311>> (accessed 3 March 2012). For updates on the latest development of the legal action, see Action on Smoking and Health’s website at <http://www.ashaust.org.au/lv3/action_plainpack.htm> (accessed 3 March 2012).

14 For a detailed explanation of the CISG, see the United Nations Commission on International Trade Law’s website <http://www.uncitral.org/uncitral/uncitral_texts/sale_goods/1980CISG.html> (accessed 3 March 2012).

15 One such concept is the notion of “good faith” found in Art 7 of the CISG. For a discussion on how the civil and common law traditions influence the interpretation of “good faith”, see Benedict C Sheehy, “Good Faith in the CISG: Interpretation Problems in Article 7” (2004) *Bepress Legal Series* Paper 339 at 1–49.

to involve transnational issues regarding the criteria for concluding valid marriages, the protection of women's rights, and the disposition of claims in the event of a dissolution of the union. In short, economic drivers resulting from the movement of goods, services, and people are "internationalising" practice even for those lawyers who do not see themselves as practicing transnational law *per se*.

8 The companion examination of globalisation as a social phenomenon will necessitate a discussion of pluralism¹⁶ and the normative layering or coexistence that takes place both nationally and internationally as norms of varying degrees of robustness vie for legitimacy within a given normative space.¹⁷ In Asia, where state legal systems coexist with normative regimes founded on religious, customary, or philosophical principles, an awareness of, and sensitivity to, this phenomenon can enhance the appreciation and consequent resolution of legal problems.¹⁸ With regard to less traditional, but no less real manifestations of pluralism, such as the coexistence of private arbitration regimes alongside the state system and the points of tangency between the two, an awareness of these new "pluralistic" configurations can enhance the young lawyer's understanding of his role and the options available for framing and resolving problems.¹⁹

9 From the practice perspective, it is clear that lawyers being trained today will confront a distinctly different landscape from that of their predecessors. The world may not be quite as flat as Thomas Friedman portrays it,²⁰ but it is certainly more compressed, with the velocity of transactions accelerating and the interaction of cultures and diverse legal systems occurring on an almost daily basis. The time-space continuum will be much different for younger lawyers, with more expected to be delivered in less time and with greater sophistication. Even if the precise modalities for capturing and "teaching" these trends in a law classroom may be daunting or difficult, it does not appear that we can in good conscience avoid the challenge.

16 At its broadest, legal pluralism explores the co-existence of two or more legal orders or legal systems in a legal space. Recent scholars have pointed out that legal pluralism allows us to see beyond state centralism and appreciate other normative forces such as customary or religious laws.

17 Paul Schiff Berman, "Global Legal Pluralism" (2007) 80 SCR 1155.

18 See Anver M Emon, "Conceiving Islamic Law in a Pluralist Society: History, Politics, and Multicultural Jurisprudence" [2006] Sing JLS 331 and Hasnil Basri Siregar, "Islamic Law in a National Legal System: A Study on the Implementation of Shari'ah in Aceh, Indonesia" (2008) 3(1) AJCL 1.

19 Brian Z Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Present" (May 2008) *Legal Studies Research Paper Series* #07-0080 <<http://ssrn.com/abstract=1010105>> (accessed 20 February 2012).

20 Thomas Friedman, *The World is Flat: A Brief History of the Twenty-first Century* (Farrar, Straus & Giroux, 1st Ed, 2005).

III. Revisiting the role of comparative law

10 Numerous articles have attempted to address the place of comparative law in legal education during the last 25 years, offering diverse perspectives, but, alas, few concrete solutions. One of the most famous articles in the field, Frankenberg’s “Critical Comparisons: Rethinking Comparative Law”²¹ perhaps best sums up the comparative law conundrum by inveighing against the “Cinderella complex”,²² which loosely interpreted means that the role and status of comparative law and of those who toil in the field are either underappreciated or overinflated, depending on the degree of alienation and the resulting vantage point. In the former case, comparative law and its practitioners are the beautiful maiden(s) waiting for recognition. In the latter, the subject and its practitioners are guilty of assuming a type of haughtiness to compensate for comparative law’s under-appreciation. This latter circumstance is sometimes described as the “reverse Cinderella complex”.

11 Suffice it to say that there has been an oscillation between these two poles, ranging from recent commentaries entitled, “The End of Comparative Law”,²³ to Lord Goff’s statement that “[c]omparative law may have been the hobby of yesterday, but it is destined to become the science of tomorrow. We must welcome rather than fear its influence”.²⁴ An analogy can be drawn to interdisciplinary legal study, which while valued in the United States and in some faculties in Europe, struggles for legitimacy in the eyes of those members of the legal academy who are focused on more traditional doctrinal subjects.²⁵ This dynamic often results in the same tension between the quest for legitimacy and the counter-tendency toward over-compensation.

12 With regard to comparative law and to other subjects that may not easily fit into the traditional legal niches and cubbyholes, it is perhaps important that those scholars engaged in these areas do not promise more than they or the field can deliver. Conversely, it is perhaps important for those involved in doctrinal areas to rethink them and to reflect on the extent to which law and legal practice are changing and on what these areas can derive from a comparative approach. At the dawn of the 21st century, is it really axiomatic that courses such as “equity and trusts” remain foundational to the practice of law? Indeed, perhaps this

21 Günter Frankenberg, “Critical Comparisons: Rethinking Comparative Law” (1985) 26 Harv Int L J 411.

22 Günter Frankenberg, “Critical Comparisons: Rethinking Comparative Law” (1985) 26 Harv Int L J 411 at 419.

23 Mathias M Siems, “The End of Comparative law” (2007) 2 JCL133.

24 Lord Goff, “The Future of the Common Law” (1997) 46 ICLQ 745 at 748.

25 Franz Werro, “Notes on the Purpose and Aims of Comparative Law” (2001) 75 Tul L Rev 1225.

is the wrong question. If we look at a legal curriculum as defining the base skill set and knowledge that young lawyers will be expected to have, then we should perhaps pose the question in terms of what the revised tool box should contain. There is, indeed, a continuing place for equity and trusts, but this does not and should not preclude a significant place for courses that will render new graduates more broadly gauged and hence better equipped to deal with the multi-faceted nature of the “legal” problems they will face.

13 The notion of the lawyer as mere technician is changing and so too should the notion of what constitutes a “legal” education. Indeed, one of the most often heard criticisms or observations put forward by corporate leaders in respect of their lawyers both inside and outside of a company is that they fail to understand the business. More broadly, it is that they fail to appreciate the cross-border, increasingly intercultural context in which business is taking place and the related matrix in which “legal” issues are arising. A statement made by Mr Christophe Jamin, Dean of France’s prestigious law school at the National Institute of Political Science (“Sciences-Po”) at a symposium on the globalisation of legal education organised by the Harvard Law School in January 2012 aptly sums up the constellation of constituencies and circumstances to which modern legal education must respond:²⁶

The members of the bar seem to be very happy with the way we teach law in France. The pressure comes from in-house counsels [of corporations]. Globalization is very important for them ... They want students to be able to speak with someone in China in the morning and with South Africa in the evening.

14 The conference invited the participation of law deans from China, Brazil, Canada, and France, each of whom had unique perspectives on the extent to which changes in legal education should be driven from within or without. More important than any single view, however, is the advent of this conference itself, grouping together as it did, participants from a selection of key emerging and highly industrialised economies, for the purpose of discussing how legal education should adapt to increasing global interconnectedness.

15 It might be too much to ask each of the doctrinal courses to include a comparative dimension, regardless of how desirable this might be. Failing this, a course in comparative legal systems that defines in practical terms the relevance of the area to the evolving international environment, stresses how history and tradition condition the contours of current systems, and extends the analysis to how judges and lawyers

26 Dean Christophe Jamin, *Deans’ Roundtable: Views from Brazil, Canada, China & France* (27 January 2012) (online streaming) <http://www.law.harvard.edu/news/2012/02/01_law-school-deans-discuss-globalization.html> (accessed 3 March 2012).

trained with a particular systemic bias may approach legal issues can provide a synthetic and contextual view of trends not immediately available within the scope of other courses. Of course, such an ambitious agenda can be open to the criticism of emphasising breadth over depth, but suitable balance should be able to mediate between the two in a manner that adds value. As Dean Jamin’s remark suggests, there appears to be at a minimum a need to sensitise students to the contours of the international legal environment and to introduce them, to the extent possible, to the fundamental grammar of other legal traditions and resulting national systems.

IV. Comparative law – Law school *versus* trade school

16 What is the business of a law school? Is law school a business? The proliferation of executive education, part-time MBA programs, and the attendant focus on advertising attest to the business dimension of higher education. The implications of these developments for law teaching are not insignificant. Creating vibrant undergraduate and graduate programs populated by willing and capable participants is part and parcel of the evolving and increasingly competitive educational environment. The competition for the best students has “gone global”. These developments are in microcosm a harbinger of, and a benchmark for, what needs to change in the field of legal education, particularly as increasing mobility and the evolving contours of the profession will lead many graduates to interact with jurisdictions alien to their own.

17 Legal education sits at an interesting crossroads between an appreciation of social science and the acquisition of a professional certification. If the curriculum is gauged too narrowly, the latter criterion is satisfied at the expense of the former. If the former is allowed to mushroom out of proportion, then the converse is true. What legal education in the 21st century must do in order to train lawyers equipped to function in the evolving legal environment is to stress problem-solving that may involve concepts that are not always strictly legal in nature. The over-compartmentalisation of legal skills and concepts in a curriculum may lead to a neat and orderly “drawer” but an incomplete set of tools and utensils.

18 It is here that interdisciplinary courses such as law and regulation or the economic analysis of law can usefully broaden the curriculum by giving students alternative or parallel prisms through which to appreciate and evaluate legal issues. Similarly, and more germane to this commentary, courses such as comparative legal systems can take broad trends and developments, such as pluralism, globalisation, and alternative dispute resolution and give them a roof under which they can then be organised and examined. It is not clear

that such courses would be as immediately accessible to students as courses in criminal law or contract. In general, they are not. However, it may be precisely for this reason that they should be incorporated into the curriculum. Particularly in those jurisdictions where legal education is still primarily oriented toward undergraduates, that is the LLB, it would seem advisable to take students out of the legal “silo” during their course of study in order to convey to them that neither law nor increasingly its practice occurs in a jurisdictional vacuum.

19 Modern legal problem-solving involves the integration of diverse “non-legal” inputs, including ones of a social, political, and cultural nature, in order to arrive at a satisfactory conclusion. This may always have been true. However, with the rise of the regulatory state and interest group constituencies in many countries, including in Europe and Asia, and the growth of cross-border trade, an exposure to courses which may be legalistic, if not legal *per se*, would appear to be particularly desirable. This then leads to the question of what can be achieved with and through such courses. Clearly, one cannot fully simulate the international environment within the “laboratory conditions” of the classroom. This conundrum also arises in applied courses, such as business ethics, where classroom discussion cannot substitute for the actual “moment of truth” when a decision must be taken. However, what these courses can do is to refine the legal antennae and instincts of young lawyers, thereby rendering them more receptive to the range of factors conditioning or otherwise underlying legal problems and the resulting increased universe of options for resolving them. Elastic notions of legal pluralism, which suggest normative conflict within a defined space may, for instance, enrich classic conflict of laws analysis. The “conflicts” may no longer arise from the clash of two positivist or state systems, but rather from new and asymmetric interactions, such as state and supra-national law as in the EU, or between private law constructs and state institutions as one witnesses in the area of arbitration and alternative dispute resolution.

20 Even if one cannot simulate these interactions in the classroom, instilling an awareness of them into the minds of young lawyers can create practical value by increasing their legal IQ and awareness. In so doing, such an approach can expand the student’s and young lawyer’s frame of reference, thereby allowing him or her to engage purposefully with the external law or system, with a view to developing a broader palette of problem-solving options. Similarly, policymakers will look upon foreign systems self-confidently as providing a broader range of potential solutions to the increasingly common range of problems confronted by societies in an age of ever-increasing interconnectedness, if not homogeneity.

V. A confluence of trends – Judicialisation

21 This commentary has touched on globalisation and the increasing velocity of international commerce to make the case for a broader legal curriculum that stresses problem-solving and awareness that may not be strictly legal in nature. Using comparative law and, to a lesser extent, such interdisciplinary courses as law and regulation and the economic analysis of law as touchstones, it is suggested that these courses can be framed in a way that gives students and young lawyers an alternative lens for evaluating “legal” problems.

22 It is perhaps useful to look at one legal area that may bring the relevance and utility of these three subject areas into practical relief. A spate of books and articles over the last several years has highlighted the trend toward the expansion of judicial power on the global level.²⁷ This judicialisation manifests itself in diverse forms, whether in the increased presence and impact of constitutional courts or in the growing interaction among administrative agencies, their rule-making and review bodies, and the ordinary courts. Tom Ginsburg aptly summarises this trend as follows:²⁸

In recent years, there has been increasing attention to the phenomenon of judicialization, the expansion of the range of activities over which judges exercise significant authority. Judges around the world now routinely make important policy decisions that only a few years ago would have been seen as properly the purview of bureaucrats, politicians, and private actors. Beyond the direct involvement of judges in decision-making, judicialization can also refer to the expanding use of trial-like procedures for making governmental decisions and the extension of law-like processes into new social spheres.

23 If one takes a course in comparative legal systems, writ large, it allows for an assessment of the interaction between the regulatory system and the courts within and across different legal systems, the scope and availability of judicial review, and more broadly the trade-offs between efficiency and fairness necessitated by varying conceptions of economic and social welfare. Different systems, of course, mediate

27 See, for example, Charles J Russo, “Judges as Umpires or Rule Makers? The Role of the Judiciary in Educational Decision Making in the United States” (2009) 10 EdLaw 33; Beverley Mclachlin, “Judicial Power and Democracy” (2000) 12 SAclJ 311; F L Morton, “Judicial Review in France: A Comparative Analysis” (1988) 36 Am J Comp L 89 and John Ferejohn, “Judicializing politics, politicizing law” (2002) 65(3) *Law and Contemporary Problems* 41.

28 Tom Ginsburg, “The Judicialization of Administrative Governance: Causes, Consequences and Limits” in *Administrative Law and Governance in Asia – Comparative Perspectives* (Tom Ginsburg & Albert H Y Chen eds) (Routledge, 2009) pp 1–20 at p 1.

among these interests and the related stakeholders in disparate ways as a function of their history, legal origin, and level of political and economic development.

24 Without the limitations of a course in comparative constitutional jurisprudence or one solely in the economic analysis of law, a course in comparative legal systems can lay a foundation for such future, more targeted exploration. Particularly in Asia where the regulatory state is vying for space within a broader legal system, or *vice versa*, a comparative look at how other systems, whether in Europe, North America or elsewhere, have mediated this interaction can only serve to enhance the perspective of students and young lawyers. With regard to Asia, two compendia published in 2009 and 2011, respectively, deal with “new courts in Asia” and “administrative law and governance in Asia”.²⁹ Contributions deal, *inter alia*, with the rise of constitutional courts and increased judicialisation in Thailand³⁰ and Korea,³¹ the development of the regulatory state in Taiwan,³² the “juridification” of administrative complaints and related review in Vietnam,³³ Singapore³⁴

29 See Tom Ginsburg, “The Judicialization of Administrative Governance: Causes, Consequences and Limits” in *Administrative Law and Governance in Asia – Comparative Perspectives* (Tom Ginsburg & Albert H Y Chen eds) (Routledge, 2009) and Andrew Harding, *New Courts in Asia* (Andrew Harding & Penelope Nicholson eds) (Routledge, 2010).

30 See, for example, Peter Leyland, “The Emergence of Administrative Justice in Thailand under the 1997 Constitution” in *Administrative Law and Governance in Asia – Comparative Perspectives* (Tom Ginsburg & Albert H Y Chen eds) (Routledge, 2009) at pp 230–257; and Andrew Harding, “The Constitutional Court of Thailand, 1998–2006” in *New Courts in Asia* (Andrew Harding & Penelope Nicholson eds) (Routledge, 2010) at pp 121–145.

31 See Youngjoon Kwon, “Bridging the Gap between Korean Substance and Western Form” in *Law and Legal Institutions in Asia* (Ann Black & Gary F Bell eds) (Cambridge University Press, 2011) at pp 151–184 and Jongcheol Kim, “Government Reform, Judicialization, and the Development of Public Law in the Republic of Korea” in *Administrative Law and Governance in Asia – Comparative Perspectives* (Tom Ginsburg & Albert H Y Chen eds) (Routledge, 2009) at pp 101–127.

32 Jiunn-Rong Yeh, “Democracy-driven Transformation to Regulatory State: The Case of Taiwan” in *Administrative Law and Governance in Asia – Comparative Perspectives* (Tom Ginsburg & Albert H Y Chen eds) (Routledge, 2009) at pp 127–143.

33 See John Gillespie, “The Juridification of Administrative Complaints and Review in Vietnam” in *Administrative Law and Governance in Asia – Comparative Perspectives* (Tom Ginsburg & Albert H Y Chen eds) (Routledge, 2009) at pp 205–230 and Dang Xuan Hop, “The Past 25 years, the Present and the Future” in *Law and Legal Institutions in Asia* (Ann Black & Gary F Bell eds) (Cambridge University Press, 2011) at pp 185–211.

34 See Jolene Lin, “The Judicialization of Governance: The Case of Singapore” in *Administrative Law and Governance in Asia – Comparative Perspectives* (Tom Ginsburg & Albert H Y Chen eds) (Routledge, 2009) at pp 287–313 and Kevin Y L Tan, “A Statist Legal Laboratory” in *Law and Legal Institutions in Asia* (Ann Black & Gary F Bell eds) (Cambridge University Press, 2011) at pp 330–371.

and Indonesia,³⁵ and the broader phenomenon of forum shopping between the ordinary courts and the administrative tribunals created to service the growing array of commercial and civic relationships implicating the interests of the state and its citizens.

25 This area loosely described as “comparative judicialisation from a systemic perspective” assumes particular topical relevance as the relationship among regulation, litigation, and individual rights is still, in many jurisdictions in Asia, being defined. The many alternative models and related systemic compromises struck are as instructive in suggesting “what not to do” as “what to do,” paying due regard to the observed, empirical effects and the related suitability of such choices to specific cultural conditions and parameters. As the EU grapples with the excesses of the regulatory super-state, coupled with a democratic deficit in many of its rule-making processes, a course in comparative legal systems allows for a macro, but pointed comparison, of the structures that promote legitimacy, progress, and efficiency or that undermine the same. Juxtaposing these developments with the consensual “ASEAN way” offers topical perspective regarding the range of compromises that can be struck on both the national and supra-national levels and their related suitability for a given context.³⁶

26 Does a course in comparative legal systems with a sub-emphasis on “judicialisation” mimic or otherwise replace a course in contract or criminal law from a doctrinal perspective? Most definitely, this is not the case. Does it offer a student or young lawyer an opportunity to get beyond his or her system in a topical and defined manner, and in so doing, to confront the forces shaping modern legal practice in a meaningful way? Here, it is submitted that the answer is affirmative. A course in comparative law, or as this note prefers, comparative legal systems is likely to be unwieldy as it seeks to group and organise trends as disparate, yet relevant, as the origin of legal systems, the effect of history thereon, the modern and increasingly multi-faceted manifestations of legal pluralism, and the implications of these forces for the judiciary, a country’s principal stakeholders, and modern legal practice. Factor in the increasingly cross-border nature of legal practice, including as it relates to what used to be, but what are no longer, parochial, national provinces, such as family law, and the above list of issues and forces, however diverse, begins to assume a certain practical relevance. It may therefore be that the notion of comparative law as it

35 Gary F Bell, “The Challenges of Legal Diversity and Law Reform” in *Law and Legal Institutions in Asia* (Ann Black & Gary F Bell eds) (Cambridge University Press, 2011) at pp 262–298.

36 The “ASEAN Way” refers to the consensual nature of decision-making, which bridges differences between countries with disparate legal and political systems, thereby resulting in an organic, flexible framework used to create norms of varying force.

relates to the legal academy needs to be rethought. The private international law approach prevalent in Europe, focusing on rules and to some extent conflicts has worked well in that context. The US model searching for a more inclusive approach that includes law and the “isms”, whether economic or sociological in nature, has anticipated the trends without perhaps having provided the new paradigm.³⁷ It may be that the fault is not so much in the proposed paradigm, but in the manner in which a course in comparative legal systems should (or could) be conceived.

27 A focus on judicialisation offers a quintessential window on diverse systemic approaches and a means of perhaps tying together relevant developments in both a practical and theoretical manner. Lawyers active in a given jurisdiction will be interested in the strength of the “rule of law” as reflected in judicial attitudes, constitutional design, and the resulting enforcement of rights whether of a civil or economic nature. Identifying structures that appear to work will spur students and young lawyers to look at the underlying factors responsible for effective, predictable decision-making, thereby encouraging them to look beyond the law to the soil in which it is planted. Again, there are limits to how far such an exercise can be taken in the classroom. However, by tying system design to effective functioning and then looking for the reasons accounting for either order or chaos, a course in comparative legal systems can bridge the gap between the theoretical and the practical.³⁸ Moreover, it can encourage students and young lawyers steeped in doctrine to ask not just “what”, but “why” in terms of the external law, lawyers and systems with which they may come into contact. Such a perspective rooted in an analysis or awareness of the concrete attributes of a given system can only promote greater cross-border understanding, thereby facilitating transnational deal-making, dispute resolution, and, where appropriate, a certain deference to the particularities and orientation of the external system.

VI. The comparative law paradigm – Scope and content

28 It may be that the notion of comparative law as presented in a law school curriculum needs to be redefined. Much ink has been spilt over the Euro-centric approach in this area and the need to update the rule-based paradigm in such venerable treatises as Zweigert and Kotz.³⁹ While true, it does appear that a focus on the common law-civil law

37 Franz Werro, “Notes on the Purpose and Aims of Comparative Law” (2001) 75 Tul L Rev 1225.

38 John H Merryman, “Comparative Law Scholarship” (1997–1998) 21 Hastings Int’l & Comp L Rev 771 at 775–777.

39 Konrad Zweigert & Hein Kotz, *An Introduction to Comparative Law* (Tony Weir translator) (Clarendon Press, 3rd Ed, 1998).

divide has enduring relevance inasmuch as these traditions have spawned legal systems throughout the world as a result of colonisation and associated economic power. A further step is to explore how these transplants⁴⁰ in the broad sense have been informed or otherwise conditioned by local conditions resulting from customary or religious laws and the attendant pluralist interactions. These forces are bound to have an effect on the functioning of nominally civil or common law systems. In this case, form does not follow function as the Bauhaus school of architecture may have claimed, but rather one is conditioned by the other in an ongoing dialectic. Such an understanding can give topical context and practical relevance to theorists, such as Legrand, Watson, Kahn-Freund,⁴¹ and Ewald,⁴² who have each taken varying views of the extent to which law can be considered to be wholly cultural dependent or self-contained and therefore easily transferable, as the case may be. More importantly, it can sensitise the student or young lawyer consumed with learning the “law” to observing the systemic context and environment in which such concepts operate or are otherwise operated upon.

29 Once this point is made, the way is open for a fuller exploration of what constitutes law and its function. Does law mean the same in Japan as it does in the United States or in Europe? Moreover, does its status within the normative hierarchy remain constant across jurisdictions? One hears that the Japanese are not litigious, preferring consensus to confrontation. However, new empirical studies suggest that this is changing.⁴³ What accounts for this evolution and what are its implications for cross-border legal practice? As Japanese courts discover their authority over corporate directors, how are they likely to use it?⁴⁴ The aggressive steps taken to prosecute the directors of Olympus may, indeed, be a harbinger of the future.⁴⁵ These developments, however

40 See the debate between Legrand and Watson on the “transplantability” of law. Pierre Legrand, “The Impossibility of Legal Transplants” (1997) 4 MJECL111. Cf Alan Watson, “Legal Transplants and European Private Law” (2000) 4.4 *Electronic Journal of Comparative Law* <<http://www.ejcl.org/ejcl/44/44-2.html>>; Alan Watson, “Legal Transplants and Law Reform” (1976) 92 LQR 79; Alan Watson, “Comparative Law and Legal Change” (1978) 37 CLJ313.

41 Otto Kahn-Freund, “On Uses and Misuses of Comparative Law” (1974) 37 MLR 1.

42 William Ewald, “Comparative Jurisprudence (II): The Logic of Legal Transplants” (1995) 43 Am J C L 489.

43 See Tom Ginsburg & Glenn Hoetker, “The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation” (2006) 35 JLS 31.

44 See, for example, Hideki Kanda & Curtis J Milhaupt, “Re-Examining Legal Transplants: The Director’s Fiduciary Duty in Japanese Corporate Law” (2003) 51(4) Am J C L 887.

45 Hiroko Tabuchi, “Arrests in Olympus Scandal Point to Widening Inquiry into a Cover-up” in *The New York Times* (16 February 2012) <<http://www.nytimes.com/2012/02/17/business/global/7-arrested-in-olympus-accounting-cover-up.html>> (accessed 23 February 2012); “Japan’s Olympus Sues Execs over Scandal, Shares (cont’d on the next page)”

anecdotal, represent a legal shift that ironically cannot be understood from a strictly legal perspective. Again, it is for this reason that a course in comparative legal systems that incorporates a discussion and, yes, an examination of the broader societal trends, whether arising from history, tradition, economics, or pluralism, impacting the legal environment can enhance the legal frame of reference of students and young lawyers. There is, as mentioned, a limit to what can be achieved in the classroom. The question, however, is whether to:

- (a) abandon the challenge because the nature of the task is ill-defined;
- (b) define the challenge in a manner which is manageable for academic purposes, but perhaps too detached from reality to be useful; or
- (c) finally, to change the terms of reference to allow for an in-depth discussion from a legalistic, if not traditionally legal vantage point, of the issues and trends shaping the modern practice environment.

This commentary argues for the third approach.

30 A discussion of the civil law-common law divide⁴⁶ sheds light on the basic internal logic of a given system and the likely distribution of power among the various systemic actors, while providing a parallel basis for examining how these basic assumptions may vary from one national system to another as a result of underlying societal, cultural, and historical factors. It also allows for an examination of the extent and qualitative nature of the macro-convergence among legal traditions that is taking place, albeit from different fundamental starting points, with statutes increasingly governing many key aspects of law in case-based common law systems, and, conversely, case law and diverse forms of judicial “policy-making” filling gaps in many civil law, and heretofore essentially code-based systems.⁴⁷ An exploration of the characteristics and associated biases of the civil and common law traditions with regard to pleadings, witness testimony and discovery will also better prepare young lawyers to function in the hybrid space of international arbitration, where the procedures adopted often reflect an amalgam

Surge on M&A Hopes” *Reuters* (10 January 2012) <<http://in.reuters.com/article/2012/01/10/olympus-idINDEE8090EP20120110>>.

46 Margaret Fordham, “Comparative Legal Traditions – Introducing the Common Law to Civil Lawyers in Asia” (2006) *AJCL* 138.

47 For more discussion on the convergence of the common and civil law traditions, see James R Maxeiner, “It’s the Law! The Missing Measure of Civil Law/Common Law Convergence” (2009) *University of Baltimore Legal Studies Research Paper* No 2009-26, pp 1–14 <<http://ssrn.com/abstract=1409562>> (accessed 3 March 2012).

of the two traditions.⁴⁸ A broader discussion of pluralism provides enhanced understanding of the normative layering that can inform the actual functioning of a given system. It can also render more concrete the range of dispute resolution fora that are available to lawyers in a given context. Viewed as interlocking planes within a pluralistic, international legal environment, arbitral options are symptomatic of the desire to accommodate diversity within an increasingly homogenised commercial environment.⁴⁹ They allow parties to address the wrinkles in Thomas Friedman’s purportedly flat world. Moreover, an approach that uses broad themes and elements of national system design to facilitate the examination of both national systems and their interaction with international trends and developments may offer law students or young lawyers an opportunity to develop a type of model for approaching the environment in which they will practice. In so doing, such a focus may provide a useful counterpoint to the typical law school approach of *ad hoc* categorisation and doctrinal mastery. Guido Calabresi’s statement, albeit made in respect of the economic analysis of law, is perhaps relevant here:⁵⁰

Legal Scholars, precisely because they have tended to eschew model building, have often proceeded in an ad hoc way, looking at cases and seeing what categories emerged. But this approach also affords only one view of the Cathedral. It may neglect some relationships among the problems involved in the cases which model building can perceive, precisely because it does generate boxes, or categories.

31 It is not suggested that a course in comparative legal systems as outlined herein reflects the type of formal model-building foundational to the economic analysis of law. However, where the analogy may hold is that a willingness to focus on themes and relationships, transposable across different systems, may provide law students with yet another view of the Cathedral, one which does not replace, but rather complements and enriches the vision offered by the traditional, doctrinal curriculum.

48 Pierre A Karrer, “The Civil Law and Common Law Divide: An International Arbitrator Tells It Like He Sees It” (2008) 63(1) *Dispute Resolution Journal* 72 at 72–77. Increasingly, *ad hoc* arbitration fora reflect hybrid procedures where pleadings exceed the bare-bones statement of claim in common law systems but fall short of the full-blown statements required by many civil law systems. Similarly, a compromise is often found between the expansive discovery permitted by many common law systems and the limited, almost non-existent scope for the same found in most civil law systems.

49 See William Twining, “Normative and Legal Pluralism: A Global Perspective” (2009) 20 *DJCIL* 473 at 500–506; Brian Z Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Present” (May 2008) *Legal Studies Research Paper Series* #07-0080 <<http://ssrn.com/abstract=1010105>>; Paul Schiff Berman, “Global Legal Pluralism” (2007) 80 *SCR* 1155.

50 Guido Calabresi & A Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral” (1972) 85 *HVLR* 1089 at 1128.

VII. Conclusion – The implications for comparative law pedagogy

32 This commentary suggests that there is a panoply of issues with which the modern lawyer should be familiar, irrespective of his or her specialty or practice area. Coming back to the question posed above, one needs to ask whether “increasing awareness” is a worthy goal of a law school curriculum, and, if so, whether this can be done with sufficient analytical rigour to render the exercise worthwhile? The answer to this question goes to the mission of a law school. At its most basic, the mission of a law school is to train the next generation of lawyers and judges. As discussed, this requires giving young lawyers the basic “tools of the trade”, recognising that these fundamental skills and concepts will only meld into a professional identity with use. Broadening the young lawyer’s perspective and resulting ability to recognise, solve, or otherwise manage novel legal problems then becomes an important supplement to the tool box, which, it is submitted, should not be neglected. Whether this should be done as a free-standing course in comparative law or as part of a substantive course in, for example, property, where comparative aspects are incorporated remains a subject of debate.⁵¹

33 However, once comparative law becomes cast as comparative legal systems and framed as a bridge to other more doctrinal courses, the case for a free-standing course becomes more compelling. Only if the area is freed from its tether to one or more of the doctrinal pillars can students explore the diverse facets of the law in a more free-flowing, and to some extent, creative manner. This does not mean that links to one or more doctrinal areas cannot or should not be made. Rather, the focus should be on presenting concepts and developments, such as the scope and availability of judicial review, and illustrating them with targeted examples, highlighting the impact of system design on actual functioning.⁵² Related questions such as what is law necessarily lead to a discussion of competing normative systems, including tradition and religion and a related discussion of pluralism. A discussion of the common law-civil law divide sets up some basic alternatives for system design and lays a foundation for discussing how these alternatives have been conjugated in different systems throughout the world. With law, pluralism, and system design in place, a meaningful discussion can be conducted on the meaning of the “rule of law”, detached from any single legal tradition and the systemic components that promote or retard its development in a given context. These foundational concepts can also

51 Cf Mathias Reimann, “Progress and Failure of Comparative Law in the Second Half of the Twentieth Century” (2002) 50 *Am J C L* 671 and Mathias Reimann, “The End of Comparative Law as an Autonomous Subject” (1996) 11 *Tul Eur & Civ L F* 49.

52 John H Merryman, “Comparative Law Scholarship” (1997–1998) 21 *Hastings Int’l & Comp L Rev* 771.

lead to discussion of regional groupings, among them ASEAN and the EU, and an examination of the systemic designs and rule-making procedures that promote the functioning of a given grouping. The burgeoning and important scholarship on law and development and its relationship to system design and the rule of law is also rendered more concrete and relevant using the comparative panorama of alternatives as a backdrop.

34 This commentary therefore argues for a *free-standing* course that allows students, young lawyers and future policymakers to think globally, and also structurally about the legal environment in which they function. Subsequent experience will shape their views and hone their skills, but it seems as though there should be at least one place in the law school curriculum where students are encouraged to think synthetically about legal systems other than their own, and to think “legalistically”, if not strictly legally, about the skill set required for effective problem-solving involving transnational issues or other external law dimensions. A lawyer graduating from an accredited programme will know the “law” of his or her jurisdiction. While this is a good start, it may, indeed, no longer be enough in today’s interconnected environment, particularly here in Asia, writ large, where “foreign” law issues and related, external systemic biases are likely to encroach upon diverse practice areas, even if the lawyer never leaves his or her own jurisdiction. It is therefore suggested that a course in comparative legal systems, focusing on system design, judicialisation, and the potential linkages to, and interactions with, the evolving international legal environment can provide a vital foundational insight to students, young lawyers, and the evolving corps of policymakers and judges, facing a multi-faceted international legal environment oscillating between the reaffirmation of national prerogatives and the accommodation of a growing number of international legal and commercial imperatives. This is the environment that young lawyers will face in the 21st century and one for which the modern law school curriculum should prepare them.