les
éditions
thémis

La Revue juridique Thémis

Volume 39, numéro 3 (2005)

On peut se procurer le présent ouvrage à:

Les Éditions Thémis
Faculté de droit, Université de Montréal
C.P. 6128, Succ. Centre-Ville
Montréal (Québec) H3C 3J7
Canada

Courriel : themis@droit.umontreal.ca
Internet : www.themis.umontreal.ca
Téléphone : (514) 343-6627
Télécopieur : (514) 343-6779

Comparative Legal Education in Canada

Catherine VALCKE*

Résumé

Parmi les nombreuses initiatives prises par les facultés de droit au Canada en matière de droit comparé, certaines remontent à fort longtemps alors que d'autres sont relativement récentes. Les initiatives les plus anciennes furent généralement le fruit d'une situation géographique particulière dans la mosaïque juridique canadienne, alors que les initiatives plus récentes découlèrent davantage de la globalisation du marché des services juridiques. Ces dernières initiatives n'ont cependant pas encore donné lieu à des stratégies pédagogiques cohérentes. Elles demeurent ponctuelles, désordonnées, dépourvues de plan d'ensemble et découlent davantage d'une réaction d'automatisme que d'une réflexion institutionnelle soutenue. L'objectif principal de cet article est de souligner l'importance de la réflexion institutionnelle dans l'élaboration des programmes d'enseignement dans un contexte de globalisation, et de soumettre quelques idées sur la façon dont cette réflexion pourrait s'élaborer en

Abstract

Among the various comparative law initiatives in place at Canadian law schools, some have been long standing, while others are more recent. Long-standing initiatives have typically resulted from a school's capitalizing on its geographical position in the Canadian polyjural landscape, whereas more recent initiatives emerged as a response to the globalization of the market for legal services. The latter initiatives have yet to congeal into coherent pedagogical strategies, however. They have remained largely disjointed, piecemeal, lacking in overarching design, the product of a knee-jerk reaction more than of careful institutional reflection. The primary purpose of this paper is to underscore the importance of institutional reflection on curriculum design in the global context, and to offer preliminary thoughts on how this reflection might proceed with respect to comparative law teaching in particular. The author ascribes the lack of institutional reflection on global initiatives to law

* Professor at the Faculty of Law of the University of Toronto. I wish to thank Jesslyn Maurier for her careful and patient research assistance.

matière d'enseignement du droit comparé. L'auteure lie le manque de réflexion institutionnelle au fait que les facultés de droit considèrent aujourd'hui leurs étudiants comme autant de consommateurs de services de formation en droit, et soutient que ce modèle devrait être remplacé par un modèle « fiduciaire » en vertu duquel les formateurs sont investis de la responsabilité d'orienter les préférences de leurs étudiants en fonction d'objectifs pédagogiques valables, plutôt que de considérer ces préférences comme étant immuables. Enfin, l'auteure suggère que toute réflexion institutionnelle sur les objectifs de la formation en droit comparé emporte l'analyse préalable de questions fondamentales concernant une étude de sujets fondamentaux comme la nature et l'objet du droit comparé, ses relations avec le système juridique du pays, le droit international, la théorie juridique et les autres disciplines connexes, et les raisons pour lesquelles le droit comparé a sa place dans la formation juridique.

schools viewing law students as consumers of legal education services, and argues that this consumer model should be replaced with a "soft fiduciary model," under which legal educators take on responsibility for channelling student preferences in line with sound pedagogical objectives, rather than simply accept these preferences as fixed. The author then suggests that institutional reflection upon the objectives of comparative legal education must inevitably begin with an exploration of such fundamental issues as the nature and object of comparative law, its relation to domestic law, international law, legal theory, and other law-related disciplines, and the reasons for having it play a role in legal education.

Table of Contents

As the tentacles of globalization reach into all aspects of our daily lives, it would have been surprising – perhaps even worrisome – if it had spared our law schools. It hasn't. In Canadian schools of common law, as in other institutions of higher learning around the world[1], "going global" is fashionable these days. Course offerings in international and comparative law abound; student and faculty exchanges are proliferating; transnational recruitment of faculty and students is expanding; international student initiatives such as mooting, journals, and internships are multiplying rapidly; visitors' programmes and transnational collaborative research projects are no longer uncommon. Teachers and administrators from across the country confirm that most[2] Canadian schools of common law are consciously attempting to move beyond domestic law[3]. All in the name of responsiveness to globalization.

However, this frenzy has yet to congeal into coherent institutional strategies. The above initiatives have remained largely disjointed, piecemeal, lacking in overarching design: the product of a knee-jerk reaction more than of careful institutional reflection. Are student exchanges a more effective training tool than on-site foreign law courses? Should comparisons between legal systems be drawn within courses on a given topic or should each legal system form the object of a separate course? Can foreign law properly be taught by non-foreigners, or by groups of foreign guest-speakers? Should Comparative Law or Comparative Method be offered as self-standing courses? Should international, comparative, and foreign law be taught only in upper years or even at the graduate level? As far as I can tell, nowhere in the voluminous literature on the general theme of globalization and legal education[4] are these specific questions

---

1 M.C. DALY, "The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century", 21 *Fordham Int'l L.J.* 1239, 1243-1245 (1998).

2 There are some exceptions. See text accompanying notes 36 and 37, *infra*.

3 See *infra* note 15.

4 See the *Symposium* on the issue in 46 *J. of Leg. Ed.* (1996); Anthony O'DONNELL and Richard JOHNSTONE, *Developing a Cross-cultural Law Curriculum*, Sydney, Cavendish Pub., 1997; Fiona COWNIE (ed.), *The Law School – Global Issues, Local Questions*, UK, Ashgate, 1999; A. BLACKETT, "Globalization and Its Ambiguities: Implications for Law School Curricular Reform", 37 *Colum. J. Trans. L.* 57 (1998); G.M. SANCHEZ, "A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal

of teaching tools and curriculum design addressed. Yet, the drive towards greater international and foreign content in legal education has, in Canada as elsewhere, pursued its course apparently unabated. Opportunities have seemingly been grabbed as they arose (a faculty member happens to be trained in a foreign legal system, a foreign university is willing to welcome our students, a donor fancies student internships in certain international organizations, etc.) with little attention being paid to whether and how they might fit into some overall, consistent pedagogical vision. The cart may be driving the horse.

This paper aims to prompt this reflection, and hopefully launch the process of restoring the horse to its rightful place. More precisely, my goals are to underscore the importance of institutional reflection upon such questions when engaging in curriculum design generally, particularly in the present context of globalization, and to offer preliminary thoughts on how this reflection might proceed with respect to comparative law teaching in particular.

At the outset, the contours of what is here meant by "comparative law teaching" must be delineated with more precision. I borrow from my colleague Adrian Popovici[5] his definition of "comparative law" as "any excursion into law that is not our own"[6], with one qualification. For present purposes, "comparative law" is defined as "any excursion into law that is not our own *for geographical reasons*". So qualified, this definition excludes excursions into law that is not our own because of *historical* reasons, in other words, law that is *no longer* our own. It also excludes excursions into law that could be described as not our own for *ideological* reasons, for example, mainstream legal ideology to the critical race theorist. On the other hand, this definition clearly includes explorations of foreign law that are not explicitly comparative, as the study of foreign law is always at

---

Language of the Major U.S. American Trading Partners", 34 *San Diego L. Rev.* 635 (1997); A. BERNABE-RIEFKOHL, "Tomorrow's Law Schools: Globalization and Legal Education", 32 *San Diego L. Rev.* 137 (1995).

5 Adrian POPOVICI, "Aperçu de l'enseignement, au Québec, du droit comparé et de l'enseignement comparatif du droit", (2002) 36 *R.J.T.* 803, 808.

6 *Id.*, 1. My translation.

least implicitly comparative[7]. Although forays into legal history and other perspectives on law clearly share tools, challenges, and objectives with comparative law strictly so-called[8], their exclusion from the present study is motivated by the fact that they have not been traditionally conceived by legal educators as partaking of comparative law, and have accordingly not been treated as such by curriculum designers.

What is most notable about the above definition, though, is that it excludes "international law"[9]. Indeed, international law qualifies as "our own", albeit perhaps at a more remote level than domestic law. As a result, the teaching of international law is excluded from the scope of this paper. This exclusion is notable because it certainly is *not* at play in the globalization frenzy that has taken over most Canadian schools of common law, which has been indiscriminately directed at things foreign and international alike[10]. This failure to distinguish between comparative and international initiatives, while understandable in the current context of globalization of legal education (more on this below[11]), is puzzling conceptually. For the movement towards greater internationalization may well

---

7 J.C. REITZ, "How to Do Comparative Law", 46 *Am. J. of Comp. L.* 617, 618 and 619 (1998); A. POPOVICI, *loc. cit.*, note 5.

8 "[L]egal history raises many of the same theoretical issues as the study of foreign law. Both are species of comparison": W. EWALD, "Comparative Jurisprudence (I): What Was It Like to Try a Rat?", 143 *U. Pa. L. Rev.* 1898, 1944 (1994-1995). In fact, *as* the title of that piece reveals, it stems from inquiries about the medieval animal trials. See also: Jacques VANDERLINDEN, *Comparer les droits*, Bruxelles, Story-Scientia/Kluwer, 1995, at 314, 418ff. Vivian Grosswald Curran suggests that comparative law is just the natural extension, beyond domestic boundaries, of the explorations of "otherness" taking place domestically, for example, through feminist or critical race theory. Whether a difference of ideology can be said to generate different "law", as opposed to just a different "perspective" on law, is an open question, the discussion of which falls beyond the scope of the present study: V. GROSSWALD CURRAN, "Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives", 46 *Am. J. Comp. L.* 657 (1998).

9 "[R]ules which are avowedly universal in character do not lend themselves to comparison. So far as it exists at all, any relationship or kinship between comparative law and the law of nations must therefore be of a very shadowy nature …": H.C. GUTTERIDGE, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research*, at 61 (1971).

10 This appears to be true elsewhere as well: J. FLOOD, "Legal Education, Globalization, and the New Imperialism", in F. COWNIE (ed.), *op. cit.*, note 4, at 127.

11 See Part II, *infra*.

lead us *away* from comparative law. Insofar as internationalization brings about the erosion of domestic geo-political boundaries[12], it also contributes to the disintegration of domestic legal systems. And without legal systems to compare, there cannot be comparative law. Admittedly, it will always be possible to compare legal *rules*[13], but, to the extent that these rules could no longer be described as belonging to distinct systems, this exercise would be no different than comparing domestic legal rules. To be sure, the realm of "law" would then be larger, but there would be no point in distinguishing between "law" and "comparative law"[14].

The various comparative law teaching initiatives that have taken place in Canadian schools of common law are described in Part I. I there distinguish between long-standing initiatives, which can be attributed to a school's particular position in the Canadian multicultural and polyjural landscape, and more recent and arguably less reflective initiatives, which emerged as a response to globalization. In Part II, I reflect upon the emergence of the latter. I there explain that the lack of institutional reflection surrounding these initiatives may be linked to another, concomitant phenomenon in Canadian and other law schools, namely, that of the increasing acceptance of the model of the law student as consumer. I outline how this model in fact precludes institutional reflection upon such curricular questions as those raised above. In Part III, I outline the limits of the consumerist model of the law student, and suggest that greater institutional reflection upon such questions is likely under an alternative, non-consumerist model, namely, the fiduciary or parental model.

---

12 See generally: M. WALZER (ed.), *Toward a Global Civil Society* (1995).

13 See: R. SACCO, "Legal Formants: A Dynamic Approach To Comparative Law", 39 *Am. J. Comp. L.* 1, 21-24 (1991).

14 See: J. GORDLEY, "Is Comparative Law a Distinct Discipline?", 46 *Am. J. Comp. L.* 607 (1998). (Arguing precisely that the comparativist does more or less the same thing as the domestic lawyer).

I. Description[15]

As a multicultural, even polyjural[16], society, Canada has always been a privileged forum for comparative law teaching[17]. Several Canadian schools of common law have successfully capitalized on this comparative advantage.

Consistent with British Columbia's large Asian population and important Pacific Rim connections, the University of British Columbia (UBC) and the University of Victoria have extensive Asian studies programmes. UBC, in particular, hosts a Centre for Asian Legal Studies which offers programmes in Chinese Legal Studies, Japanese Legal Studies, and Southeast Asian Legal Studies. As expected, the law faculty at UBC offers a wide-range of Asian law courses and seminars taught by Asian visitors and at least one full-time faculty member specializing in Asian legal studies[18].

---

15 The data for this account were gathered through (1) a compilation of the information revealed in the latest calendars and websites, and (2) a survey of various administrators and teachers involved in comparative law teaching at most Canadian schools of common law. (We were unable to reach administrators or teachers at Osgoode Hall Law School, University of Ottawa, Queen's University, and University of Victoria). Specifically, we investigated, for each law school: (1) the nature, content, level, enrolment, format, evaluation method, and longevity of comparative law courses and seminars (including foreign and excluding international law); (2) the number, position, origin, and professional qualification of comparative law teachers; (3) the number and location of student exchanges; (4) any other initiatives, such as dual degrees, affiliations with other university departments, student moots, and visitors' programmes; (5) the motives, professional and academic, underlying the comparative law program, if any.

16 The term comes from David HOWES, "From Polyjurality to Monojurality: The Transformation of Quebec Law 1875-1929", (1986-1987) 32 *McGill L.J.* 523. It refers to a plurality of legal systems or traditions.

17 Canada harbours three legal traditions: the dominant English common law tradition, the French civil law tradition governing matters of private law in Quebec, and to a certain extent, although less formally, the Chtonic or First Nations law tradition. On these traditions generally, see: H. Patrick GLENN, *Legal Traditions of the World*, Montreal, McGill University, 2000, at 56-86, 116-157, 205-251. On the civil law tradition in Canada, see: Jean Gabriel CASTEL, *The Civil Law System of the Province of Quebec*, Toronto, Butterworths, 1962, at 1-58; John E.C. BRIERLEY and Roderick A. MACDONALD (eds.), *Quebec Civil Law – An Introduction to Quebec Private Law*, Toronto, Emond Montgomery Publications, 1993, at 5-198; Louis BAUDOUIN, *Le droit civil de la province de Québec – Modèle vivant de droit comparé*, Montréal, Wilson & Lafleur, 1953.

18 Five teachers of Asian law are listed in UBC's most recent Calendar.

The law schools at the University of Victoria and the University of Saskatchewan have forged strong links with the aboriginal population. Fifteen per cent of University of Saskatchewan law students are aboriginal, and aboriginal law expertise is generally highly valued in the Saskatchewan legal market. Although the courses and seminars in aboriginal law offered at University of Saskatchewan are no greater in number than in most other Canadian schools of common law[19], they seem to be better attended[20]. As for University of Victoria, it recently established an Inuit law programme in collaboration with Nunavut Arctic College and the Akitsiraq Law School Society of Iqaluit, Nunavut.

Also noteworthy is the University of Moncton, which distinguishes itself by offering a common law LL.B. degree in French. (Atlantic Canada is home to a relatively important Acadian population.) This is not strictly a comparative law degree, but it is noted here because the linguistic and cultural bridging that this enterprise implies likely shares many of the challenges of comparative law teaching.

Last but not least, the University of Ottawa and McGill University are well-known for their National Programmes, which allow law students to obtain dual degrees in civil and common law[21]. While the University of Ottawa comprises two distinct law faculties, one civilian, the other of common law, each with its own teaching body and administrative structure, McGill has always operated with one single law faculty made up of civilian and common law instructors, students, and courses[22]. Until recently, both these Programmes proceeded sequentially, that is, by requiring that students first obtain one or the other of the two degrees in three years, and thereafter

---

19 University of Saskatchewan's latest Calendar lists one large course and one seminar in Aboriginal law. A glance at other schools' calendars reveals that this is comparable, in any one year, to the offerings at University of Toronto, Osgoode Hall Law School, University of Windsor, University of Victoria, UBC, University of Calgary, and Dalhousie University.

20 According to Professor Zlotkin, roughly 20% of upper year students enroll in at least one Aboriginal law course or seminar.

21 Roderick A. MACDONALD, "The National Law Programme at McGill: Origins, Establishment, Prospects", (1990) 13 *Dalhousie L.J.* 211.

22 Also worth noting here are McGill's very active Institute for Comparative Law and Centre for Private and Comparative Law Research, which were established in the 1975 and 1978 respectively, with a view to fostering comparative and private law research and exchanges.

allowing them to obtain the other degree through an additional year of study in the other system. This model subsequently inspired many other Canadian schools of common law to team up with a Quebec law faculty in order to open up the same possibility for their respective students[23]. In 1999, McGill boldly moved to a different model, whereby the second degree is no longer just an option. All students now obtain both degrees after three very full years (105 credits) of thoroughly integrated civilian and common law studies[24]. The integration is thorough indeed: not only do students take civil and common law courses in each of their three years, but civil and common law teaching are combined within courses, most notably first-year basic courses[25].

These are particular areas of expertise in comparative law which some Canadian schools of common law have developed by capitalizing on their geographical situation in the multicultural and polyjural Canadian landscape. The geographical factor has provided these schools with a natural criterion around which to organize, at least preliminarily, their respective curricula. This geographical factor has been long standing, as is the above-described specialization of Canadian schools[26].

The more recent phenomenon in Canadian comparative law teaching is that brought about by the globalization frenzy. Like globalization itself, the frenzy has of course defied geography: it has hit specialized and non-specialized Canadian schools alike, albeit to varying degrees. This phenomenon can best be described as a combination of two elements, one formal, the other substantive.

---

23 Dalhousie University with Laval University and University of Sherbrooke; Osgoode Hall Law School with University of Montreal; Queen's University with University of Sherbrooke; University of Western Ontario with Laval University; University of Windsor with the Université du Québec à Montréal.

24 For detailed descriptions of this programme, see: Yves-M. MORISSETTE, "Transsystemic Law Teaching and McGill's Integrated Civil and Common Law Programme", 52 *J. of Leg. Ed.* 12 (2002); Julie BÉDARD, "Transsystemic Teaching of Law at McGill: 'Radical Changes, Old and New Hats'", (2001) 27 *Queen's L.J.* 237; Daniel JUTRAS, "Énoncer l'indicible : le droit entre langues et traditions", (2000) *R.I.D.C.* 781, 792 and 793.

25 Contractual Obligations, Extra-Contractual Obligations/Torts, Evidence, Family Law, Consumer Law, Private International Law, Sale, Business Associations, and Secured Transactions are examples of courses taught on a "transsystemic" basis.

26 With the exception of University of Victoria's Inuit law programme, which is a brand new initiative.

The formal element has been aptly termed curricular "*laissez-faire*"[27]. The global legal market, we know all too well by now[28], calls for a much greater diversity of skills and expertise than domestic legal markets ever did. Traditionally, law jobs in any one domestic market all called for more or less the same basic skill and education package. In the global market, there is no longer such a thing as a "basic" package. There are only different jobs with different packages. As any good market producer would have done, Canadian law schools have attempted to meet this diversification in the demand by diversifying the supply. And what better way to achieve this than by "decentralizing" curriculum design into the hands of the students? Gone are the days when the law school administration imposed a standard "one size fits all" curriculum on all students. Students are now free to design their individualized curricula in accordance – so the reasoning goes – with their personal needs and aspirations. (McGill's move from a fourth-year optional National Programme to a three-year mandatory bijural programme bucks the trend in this respect). The plurality of professional profiles that is bound to emerge from this exercise is highly desirable in the current global market.

However, for *laissez-faire* of any kind to operate effectively, there must be a large number of options from which to choose. On the substantive front, therefore, curricular *laissez-faire* calls for an increase in the number and kinds of offerings available to students. Upper-year students can now obtain academic credit, not just for course work, but also for a variety of activities traditionally classified as "extra-curricular" (mooting, clinic work, journal editing, internships, reading groups, etc). A greater proportion of credits is now assigned to optional courses, and a large number and diversity of courses is available, some of which can be taken in other departments or universities. At some institutions, students can even design their own courses or research programmes. Moreover, students are in a position to choose courses on the basis of, not just content or subject matter, but also format (the same course may be offered in a two – or four – credit versions, in seminar or lecture format), evaluation methods (standard or take-home examinations, long or short papers, presentations etc.), or scheduling of the course or its examination.

---

27 D.G. RÉAUME, *Rethinking the Laissez-Faire Law Curriculum: Fostering Pluralism and Interdisciplinarity*, draft paper, 2001. Réaume uses the term to refer both to the students and the instructors' role in curriculum design. I do not discuss the instructors' role in this paper.

28 *Supra* note 4.

Globalization has played a crucial role in the enlargement of curricular possibilities. While domestic law largely defined the realm of these possibilities just a few decades ago, the current global context has unearthed a bottomless supply of foreign and international pools from which to draw new teaching materials. Most striking in this respect is the furious proliferation of student exchanges over the past few years. All Canadian schools of common law currently offer their students the possibility to participate in formal exchanges with foreign institutions and/or to arrange for their own exchanges with a foreign institution of their choice[29].

The profile of courses and instructors has also changed. Courses such as Pacific Rim Law, European Community Law, Comparative Property Systems, Law of Developing Nations, International Criminal Law, Comparative Constitutional and Foreign Relations Law, International Business Law, Comparative Human Rights Law, and Canada-US-Mexico Economic Relations Law are common currency in today's Canadian law curriculum. As for instructors, their profile appears to parallel the above definition of "comparative law" as excluding "international law" on the ground that it is "our own". Indeed, most international law courses currently on offer are taught by full-time Canadian instructors, whereas most comparative law courses, with the exception of civil or aboriginal law, are taught or co-taught by visiting foreign nationals. Like international law courses, civil law and aboriginal law courses are typically taught by full-time Canadian instructors.

II. A Partial Explanation

Our survey of the literature[30] and of Canadian legal educators[31] reveals that little institutional reflection has been devoted to rationalizing this effervescence of new teaching tools and materials however. How can this be? Would we not expect legal educators everywhere to

---

29 The number of formal exchanges varies greatly (University of Windsor – 1; Dalhousie University – 2; University of Toronto and University of Calgary – 6; Queen's University – 8; Osgoode Hall Law School – 9; University of Victoria and UBC – 13). As do the foreign institutions' locations (United States, England, Ireland, Australia, New Zealand, France, Denmark, Norway, Italy, Spain, Netherlands, West Indies, Japan, China, Zimbabwe, South Africa, South America, etc.).

30 *Supra* note 4.

31 *Supra* note 15.

sit back and reflect critically upon how best to deliver international and comparative legal education? To sort out, compare, and prioritize the various new tools at their disposal? To ask themselves which of student exchanges or on-site foreign law courses is a superior educational medium; whether comparisons between legal systems are better drawn within courses on a given topic or by way of separate courses on separate systems; whether foreign law can properly be taught by non-foreigners, by groups of foreign guest-speakers; whether Comparative Law or Comparative Method should be offered as self-standing courses; whether comparative legal education should be confined to upper years or to the graduate level; etc.? While several teachers of comparative law have offered some insightful reflections on their individual teaching[32], this reflection has yet to carry over to administrative levels and be applied to curriculum design. Is this not somewhat surprising?

I would answer in the negative: the paucity of institutional reflection on these issues is not surprising, *at least not in the present context of curricular laissez-faire.* Indeed, curricular *laissez-faire* is premised on the view that law students are consumers, that is, consumers of legal education services. These services are offered to them in a great variety of shapes and forms, and the process of their selection is no different than that of shopping for other market products: it falls upon students to obtain information about the various products on offer, to weigh their pros and cons, and to pick those they consider best suited to their individual preferences[33].

Under this model of the law student, there is no need for institutions to reflect upon curricular issues, *for this task is left to students to perform on an individual basis.* It belongs to each student to determine which of Japanese Civil Procedure, Topics in Mongolian Law, Business Transactions in Kenya, or Comparative Land Law

---

32 *Id.*

33 It could be argued that this consumerist model goes hand in hand with, or even flows from, tuition increases: the pressure to "please the customer" is that much greater, (so the argument goes), where the customer has to pay a high price for the services. This issue calls for further exploration than can be undertaken here, but at first glance I would say that I am not convinced that this is the case. It seems to me that institutions compete for the best students regardless of these institutions' means of financing. Certainly, institutions that are, for example, governmentally funded on a *per capita* basis would face a similar kind of competitive pressure.

best suits their intellectual and professional aspirations. It also belongs to each student to decide whether to take these courses in first or upper years, or in graduate school, from visiting nationals or full-time domestic instructors. Or perhaps would it be more productive to concentrate on the Japanese legal system and spend a summer, a term, a year at a Japanese institution? There is no need for law schools to rationalize the delivery of curricular options into a coherent vision under the consumer model, because this task has been delegated to the students. All that is left to law schools in this context is to offer the greatest number and diversity of options possible[34].

I would suggest that the paucity of institutional reflection on comparative law teaching in Canadian schools of common law stems, at least in part, from an increased acceptance of the model of the law student as consumer. Not only is this model conceptually consistent with the globalization of the market for legal services, as just explained, but the timing of the recent flurry of international and comparative offerings in these schools raises doubts about the possibility of their having been brought about for non-consumerist, pedagogical reasons. If it is truly pedagogical reasons, rather than jobs and student demand, that drove these reforms, why is it that these same reasons were not deemed sufficiently imperative to warrant similar reforms a few decades earlier? Surely, such reasons were as valuable then than they are now, and, although the "global village" as we know it had yet to emerge, there always existed plenty of foreign legal systems on which to draw for pedagogical purposes. Moreover, administrators and teachers across the country confirm that, as a matter of fact, institutional decisions concerning comparative and international law offerings are, like other curricular decisions, very much driven by student demand, and student demand in turn closely mirrors employment prospects[35].

---

34 To my knowledge, the "global law school" at New York University is the most extreme example of this vision of legal education: J.E. SEXTON, "The Global Law School Program at New York University", 46 *J. Leg. Ed.* 329 (1996); M. REISMAN, "Designing Law Curricula for a Transnational Industrial and Science-Based Civilization", 46 *J. Leg. Ed.* 322 (1996).

35 *Supra* note 15. See also: H.W. ARTHURS, "The Political Economy of Canadian Legal Education", in Anthony BRADNEY and Fiona COWNIE (eds.), *Transformative Visions of Legal Education*, Blackwell, 1998, at 14, 31.

Hence does the prominence and popularity of comparative offerings in any one school's curriculum appear to be directly proportional to the extent to which this school's graduates can hope for employment beyond the local bar. As none of the Canadian provincial bars either require or offer comparative law training[36], law students aspiring to practice law locally typically still choose "core courses" over comparative law courses[37]. For the same reason, among courses taught by non-faculty members, students typically still prefer those taught by local practitioners over those taught by foreigners, as the former are more likely to open up employment prospects. Foreign exchanges, in contrast, tend to be popular among students in all Canadian law schools, but the reason for this popularity is unclear: at least some administrators seem to think that it is more likely attributable to a desire to travel than to a genuine interest in comparative legal training.

Yet, while conceding that student demand is the driving force behind curricular reform, Canadian legal educators have mixed feelings about whether this is a desirable state of affairs. They quickly point out that there are other "better" or "more legitimate" reasons to teach international and comparative law –genuine pedagogical reasons relating to the "broadening of intellectual horizons", "the importance of locating one's legal system in a larger context", or the value of "seeing how things are done elsewhere"[38]. The fact that legal educators throughout Canada appear to prefer such reasons to those pertaining to jobs and student demand is significant for present purposes, as it indicates, at a minimum, that these educators are not entirely comfortable with the consumer model of the law student.

---

[36] This is true even of courses such as Aboriginal Law or Conflicts of Laws, with one exception: one provincial bar has recently included some Conflicts materials within one of its pre-existing courses. In one province, the administrator in charge of the bar programme admitted "not being familiar" with the term "Comparative Law"!

[37] Much ink has been spilled on describing this phenomenon. Most notably, see: Harry W. ARTHURS, Chair, *Report to the Social Science and Humanities Research Council by the Consultative Group on Research and Education in Law* (1983) (hereinafter "The *Arthurs Report*"). See also: William L. TWINING, *Blackstone's Tower: The English Law School*, London, Stevens & Sons/Sweet & Maxwell, 1994; William L. TWINING, *Law in Context: Enlarging a Discipline* (1997); C. Ian KYER and Jerome E. BICKENBACH, *The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario, 1923-1957*, Toronto, Osgoode Society, 1987.

[38] *Supra* note 15.

III. Some Thoughts on a New Direction

There are indeed good reasons to question whether the consumer model of the law student is the only, or even the best, model for legal education. Clearly, this model aptly captures certain aspects of the relationship between law students and legal educators. Whether we like it or not, insofar as students are in a position to choose which law school to attend, and, once in, whether to stay or go elsewhere, they are very much acting like consumers. However, the consumer model squares less well with other aspects of the law student-legal educator relationship. Most importantly, this model assumes that student preferences are fixed, whereas legal education, like any form of education, aims by definition to effect a certain degree of "mind alteration." As we now know all too well[39], the ultimate role of legal education is, despite what many students still appear to believe[40], not to fill them with legal information, but rather to enable them to find and process the information they need, to familiarize them with legal reasoning, to get them to "think like lawyers".

Insofar as mind alteration is the ultimate end of legal education, a parental or fiduciary model arguably better captures the law student-legal educator relation than does the consumer model. Recall that, under the consumer model, legal educators are to take their students' interests as given, and leave it to them to design an individual curriculum that will best match these interests. The role of the legal educators is there limited to providing students with as many curricular options as possible. Under the fiduciary model, in contrast, the role of legal educators is more interventionist and demanding. They are to determine what is in their students' best interest, and design the curriculum accordingly.

The inherent paternalism of this model may make it unpalatable to many. Yet, this model is clearly at play in legal education, in forms sometimes much more extreme than what is suggested here.

---

39 The *Arthurs Report, op. cit.*, note 37.

40 For example, students still insist on selecting their courses based on what they (wrongly) perceive to be the expectations of the employers they target (business-type courses for business-type employers, etc.), despite repeated assurances by legal educators and employers alike that, for the large majority of employers, the content of the courses that they take is not nearly as important as their performance in these courses.

Indeed, the role of legal education is sometimes described as altering, not just the mind of law students, but also their character and aspirations, that is, to transform them into, not just competent legal thinkers, but also ethical human beings, socially-conscious professionals, responsible world citizens[41].

If the ultimate role of legal education is to educate students to "feel and think like lawyers", then it is this pedagogical objective, more than jobs and student demand, that must ultimately inform the provision of legal education. This is not to suggest that student choice in curricular design must be eradicated altogether. There is nothing wrong with allowing students to exercise choice, so long as the options from which they are to choose have been defined by sound pedagogy –"modified" or "controlled" curricular *laissez-faire* clearly is one option which pedagogically-minded law schools might legitimately decide to pursue. What matters here is that this decision be taken by law schools on the basis of pedagogical concerns. The task of designing a law curriculum that will best educate students to "feel and think like lawyers", therefore, falls, not to law students, but to legal educators everywhere. Hence the need to reflect, at an institutional level, upon curriculum issues in general.

Now, this need is, if anything, exacerbated in the face of the proliferation of comparative and international options brought about by globalization. When the scope of legal education was defined in terms of domestic law, law schools could still somewhat realistically aim at covering "all" the principal fields of law in three years of mandatory courses, even if only summarily. A good dose of "core" courses sprinkled with a few theory seminars for good measure would do the trick. Since exhaustiveness in coverage was within reach – or so it was thought – there was no apparent need and therefore little drive to search for an alternative criterion by which to design the curriculum.

---

41 See, for example: A. O'DONNELL and R. JOHNSTONE, *op. cit.*, note 4, at 20; Jamie CASSELS, "Legal Education in British Columbia: Trends and Issues", (2001) 9 *The Advocate* 367, 372. See also the visionary suggestions of some legal educators that the eye-opening that is likely to result from comparative legal education may improve prospects for world peace, international solidarity, and the like, reported in W. EWALD, *loc. cit.*, note 8, 2147; R. SACCO, *loc. cit.*, note 13, 2.

Once national boundaries are lifted and foreign and international law barge in, however, it is no longer clear what the "principal" fields of the law are, and exhaustiveness simply is unthinkable. Short of embracing curricular *laissez-faire*, law schools are faced with having to make hard curricular choices. For example, it may be that, from a pedagogical perspective, the most appropriate response to the employment diversification phenomenon that has attended the globalization of the market for legal services is not to attempt to churn out as diverse and numerous professional profiles as possible, but in fact to retreat from specialization altogether. To retreat, that is, into providing the most basic form of legal education we know: to hone analytical, critical, and legal reasoning skills, perhaps also to foster ethical, even virtuous sentiment – to aim for a most academic and liberal form of legal education that would offer a solid grounding suitable to all of the various professional profiles in demand, without targeting any one of these profiles in particular. Alternatively, the most appropriate response may be for law schools to resist providing shallow outlooks on a great number of foreign legal systems and favour a deeper exploration of a few or even just one other legal system (as the University of Saskatchewan, the University of Ottawa, and McGill University have done) on the ground that expertise in one or a few other legal system is more valuable than dilettantism in many. Whichever is the most appropriate response for any one law school, however, the formulation of this response will require much more institutional reflection on comparative legal education than has taken place to date. Although engaging in this reflection is beyond the scope of this paper, a few thoughts as to how it might proceed readily come to mind.

The first step in this reflection ought to be to identify the pedagogical objectives underlying comparative law teaching. This in turn requires that we reflect upon the reasons for *doing* comparative law more generally. Many Canadian law teachers who do not consider themselves comparativists proper report that they occasionally resort to comparative law as a means of enriching their domestic law courses[42]. This is most clearly the case where a domestic legal regime is genealogically related to a foreign one, due either to colonialism

---

42 *Supra* note 15. See also: M. REIMANN, "The End of Comparative Law as an Autonomous Subject", 11 *Tul. Eur. & Civ. L.F.* 49, 50 (1996); G.P. FLETCHER, "Comparative Law as a Subversive Discipline", 46 *Am. J. Comp. L.* 683 (1998); J.C. REITZ, *loc. cit.*, note 7.

or to another form of "legal transplantation"[43]. However comparative law can also be useful for the contrasts, as opposed to the parallels, it offers. Several teachers confirm using comparative law to outline the significance of the domestic constitutional structure, family law regime, taxation system, contract law remedies, etc., by contrasting them with their alternatives. So it seems that comparative law is useful to deepen students' understanding of the way (domestic) lawyers think. However is comparative law bound to remain peripheral or accessory to domestic legal education[44]?

Law and Economics scholars remark that comparative law provides them with an enlarged pool of alternative models for legislative and institutional reform[45]. International lawyers maintain that comparative law lies at the heart of any transnational harmonization project[46]. Legal philosophers[47], historians[48], sociologists[49] and anthropologists[50], among other social scientists[51], report that they

---

43 See: J. VANDERLINDEN, *op. cit.*, note 8, at 313ff. On legal transplants, see in particular: Alan WATSON, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, Scottish Academic Press, 1974; W. EWALD, "Comparative Jurisprudence II: The Logic of Legal Transplants", 43 *Am. J. Comp. L.* 489 (1995); A. LEGRAND, "The Impossibility of 'Legal Transplants'", (1997) 4 *Maastricht J. Eur. & Comp. L.* 111.

44 P. LEGRAND, "Comparative Legal Studies and a Commitment to Theory" 58 *Mod. L. Rev.* 262, 264 (1995).

45 Colleen M. FLOOD, *International Health Care Reform: A Legal, Economic, and Political Analysis* (2000); U. MATTEI, *Comparative Law and Economics* (1997); J.E. SEXTON, *loc. cit.*, note 34, 334.

46 J. GORDLEY, "Comparative Legal Research: Its Function In the Development of Harmonized Law", 43 *Am. J. Comp. L.* 555 (1995); R. SACCO, *loc. cit.*, note 13, 2.

47 H. GROTIUS, *De iure Belli ac Pacis*, proleg., sec. 58 (Paris, 1625), quoted in P. STEIN, "The Quest for a Systematic Civil Law", 90 *Proceedings of the British Academy* 147, at 157.

48 A. WATSON, *The Evolution of Western Private Law* (2001); A. WATSON, *Critical Studies in Ancient Law, Comparative Law and Legal History* (2001); A. WATSON, *op. cit.*, note 43.

49 M. RHEINSTEIN (ed.), *Max Weber on Law in Economy and Society* (1969); R. ABEL, "Law as Law: Inertia as a Social Theory of Law", 80 *Mich. L. Rev.* 785 (1982).

50 V. GROSSWALD CURRAN, *loc. cit.*, note 8, 661, 663, 666 and 667; R. COOMBE, "The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization", 10 *Am. U. J. Int'l L. & Pol'y* 791 (1995).

51 J.C. REITZ, *loc. cit.*, note 7, 625; A. BLACKETT, "Globalization and Its Ambiguities: Implications for Law School Curricular Reform", 37 *Colum. J. of Trans. L.* 57 (1998), 67, 77.

make ample use of comparative legal data in attempting to prove theories about law in general. If so, the value of comparative law teaching clearly reaches beyond that of a mere accessory to domestic legal education. Yet, is comparative law doomed to remain "a mere appendage of social science"[52]? Does it constitute an academic discipline in its own right, one that is worth teaching in tandem with, or sequentially to domestic law[53]? Is there any pedagogical value in teaching students "how to think like a foreign lawyer," alongside "how to think like a domestic lawyer"[54]?

Clearly, these questions in turn take us back to others, more general. In particular, "What does 'comparative law' *mean*?" and "What is it about 'law' that can be *compared*?"[55]. These basic questions must be explored before a sensible comparative law curriculum can be put together. Only then can answers be provided to the various questions of teaching tools and curricular design raised above.

*
* *

---

52 J.C. REITZ, *loc. cit.*, note 7, 625. Ugo Mattei suggests that therein lies the future of comparative law: U. MATTEI, "An Opportunity Not to Be Missed: The Future of Comparative Law in the United States", 46 *Am. J. Comp. L.* 709 (1998)

53 James Gordley does not think so: J. GORDLEY, *loc. cit.*, note 14. See also: A.T. VON MEHREN, "An Academic Tradition for Comparative Law?", 19 *Am. J. Comp. L.* 624 (1971); P. ARMINJON, B. NOLDE and M. WOLFF, *Traité de droit comparé*, Paris, LGDJ, 1950, quoted in J. VANDERLINDEN, *op. cit.*, note 8, at 309.

54 This is what I attempt to do at the University of Toronto in my seminar "Civil Law: Introduction to the French Law of Obligations".

55 The subject has been much discussed in the literature. See, for example: A.T. VON MEHREN, *loc. cit.*, note 53, 624. ("Strictly speaking, there is no subject matter properly denominated comparative law; the term is simply shorthand for the comparative study of [the rules] of two or more legal orders."); J. MAYDA, "Some Critical Reflections on Contemporary Comparative Law", in Konrad ZWEIGERT and Hans-J. PUTTFARKEN (eds.), *Rechtsvergleichung*, Darmstadt, Wissenschaftliche Buchgesellschaft, 1978, at 361; G. FRANKENBERG, "Critical Comparisons: Re-thinking Comparative Law", 26 *Harv. Int'l L.J.* 411 (1985); B. MARKESINIS, "Comparative Law – A Subject in Search of an Audience", 53 *Mod. L. Rev.* 1 (1990); Mark VAN HOECKE and Mark WARRINGTON, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law", (1998) 47 *Int'l & Comp. L.Q.* 495; G. SAMUEL, "Comparative Law and Jurisprudence", 47 *Int'l & Comp. L.Q.* 817 (1998); W. EWALD, *loc. cit.*, note 8, 1961ff.

Among the various comparative law initiatives in place at Canadian schools of common law, some have been long standing, while others are more recent. Long-standing initiatives have typically resulted from a school's capitalizing on its geographical position in the Canadian polyjural landscape –the bijural law programmes at the University of Ottawa, and McGill University, and the emphasis on aboriginal law at University of Saskatchewan are examples of such long-standing initiatives. More recent comparative law initiatives, in contrast, emerged as a response to the globalization of the market for legal services. Courses in foreign law, student and faculty exchanges with foreign institutions, transnational recruitment of faculty and students, student foreign law initiatives such as mooting, journals, and internships, foreign visitors' programmes are now common currency in almost all Canadian schools of common law, albeit to varying degrees.

However, little institutional reflection has accompanied the emergence of the latter initiatives. Like their peers elsewhere, Canadian legal educators have yet to pause to wonder which of student exchanges or on-site foreign law courses is a superior educational medium; whether comparisons between legal systems are better drawn within courses on a given topic or by way of separate courses on separate systems; whether foreign law can properly be taught by non-foreigners; whether Comparative Law or Comparative Method should be offered as self-standing courses; whether comparative legal education should be confined to upper years or to the graduate level; the list goes on. The rationalization of the recent wave of comparative law initiatives into some coherent, overarching pedagogical vision of comparative legal education remains to be undertaken, yet the proliferation of comparative law offerings in Canadian schools of common law has pursued its course unabated.

I have suggested that this lack of institutional reflection is not surprising in the current educational context, where law students are considered as consumers and law schools as legal education service providers. Under this consumerist model, the task of understanding, sorting, and choosing curricular offerings falls to students – they are in charge of designing the individual curricula that best fit their interests and aspirations. And legal educators are, in this context, left with little else than ensuring that as many different curricular options are available for students to choose from.

I have argued that, insofar as successful legal education entails a certain degree of mind alteration, a fiduciary or parental model may better capture the law student-legal educator relationship. Under this model, student preferences are not accepted as given, and the role of legal educators is not confined to catering blindly to these preferences. Rather, it falls to legal educators to channel student choice in accordance with pedagogical objectives. Under the fiduciary model, therefore, it is imperative that law schools formulate coherent pedagogical strategies. While this is true of legal education generally, the cry for rationalization, and the attendant institutional reflection, is particularly strident with respect to comparative legal education, which offers an endless supply of curricular possibilities.

Law schools that take their educational role seriously hence must ask themselves what "comparative law" means; what it is about "law" that can be compared; whether comparative law is bound to remain peripheral to domestic legal education or can constitute an academic discipline in its own right; whether there is pedagogical value in teaching students "how to think like a foreign lawyer", alongside "how to think like a domestic lawyer", and so on.

The primary purpose of this paper was to underscore the importance of institutional reflection on curriculum design in the global context, and to offer preliminary thoughts on how this reflection might proceed with respect to comparative law teaching in particular. Its purpose was not actually to answer the specific curricular questions raised above. As a result, these questions are, once again, left unanswered. Nonetheless, it is hoped that the present discussion will have assisted in launching the process by which these answers can eventually be attained. Perhaps the poor horse is a little closer to regaining its rightful place.