

INTEGRATING INTERNATIONAL PERSPECTIVES IN CIVIL PROCEDURE

By:

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“[L]ike sailing, gardening, politics, and poetry, law and ethnography are crafts of place: they work by light of local knowledge.”

Clifford Geertz,

I. Excerpt from Subrin & Woo, *Litigating in America: Civil Procedure in Context* (Aspen Publishing, forthcoming 2006)

Nothing reminds us more of the importance of placing legal process in a cultural context than when we step out before a class of new law students, to explain some technical rule of civil procedure. While new law students normally find the subject of torts or criminal law accessible, they frequently find civil procedure baffling and mysterious. Since such topics as torts or criminal law have resonance in everyday life, first year law students are able to find connections to these topics from which they can embark into a deeper learning and understanding. Civil procedure, however, perhaps more than any other first year course, is imbued with its own legal culture, one with which we (as teachers) are entrusted to translate and to bring novices into the realm. As rules regulating how disputes are to proceed in the formal legal system, civil procedure rules are rooted in an “internal legal culture” that is as yet foreign to one new to the profession.² Hence, we cannot teach civil procedure to our law students without grounding them in the local context. Similarly, we cannot participate in any globalization project without a firmer understanding of the assumptions and history underlying our own legal structures.

So, how do we explain this American civil litigation system to our American law students? Equally important, how do we explain our legal process to foreign observers who may be seeking to adopt and reform their domestic legal systems? Both may be strangers to the American legal culture. Cross-fertilization does not mean the simple imposition of a western legal framework onto a non-western one. Rather, it requires the possibility of achieving “true” representation or accurate representation cross-cultural understanding. Understanding civil procedure does not simply mean reading the rules and knowing the logic behind these rules. It requires an understanding the history of these rules, how they have been used in practice, and the values they contain.

¹ Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective in the Interpretation of Culture: Selected Essays* 168-234 (Basic Books, 1973) [hereinafter Geertz].

² Lawrence M. Friedman, *Law and Society: An Introduction.*, 76.

Indeed, the concept of “naming, blaming, and claiming,”³ so inherent in law, seems inextricably tied to our cultural, social and political sense of right and wrong. While this claim makes sense with reference to substantive law – that is, the topics of torts, contracts, constitutional law -- it appears to many to make less sense when applied to procedural law. But procedural law, or procedural justice, gets its legitimacy precisely from perceptions of its neutrality, rationality, and ability to curb individual and political discretion. This “neutrality” and “rationality” are said to rise above local particularities of time and place.

While the rules of civil procedure are driven by universal norms of efficiency, predictability and consistency, how they come through in the process of indigenous legal drafting and political debate gives these rules a distinctly local flavor. As Lawrence Friedman has written, “cultural factors are an essential ingredient in turning a static structure and a static collection of norms into a body of living law. Adding the legal culture to the picture is like winding up a clock or plugging in a machine. It sets everything in motion.”⁴ One can even make the seemingly outrageous claim that legal process may be even more path-dependent and subject to local culture than substantive law. While substantive law can be easily changed by legislation, legal process as institutionalized may require more coordinated and sustained efforts in order for change to occur...⁵

II. Why Integrate International Perspective Into the First Year? Why Civil Procedure?

1. Why international? Most commonly cited reason is globalization and cross border economic transactions and disputes necessitates an understanding of other legal systems and cultures.
 - a. What do we mean by international perspective? Typically, international (rules governing relations between the states, between private citizens of different states); comparative (studies of other legal systems); transnational litigation.
 - b. Problems: difficult to predict which laws might come into play in a particular practice; requires area expertise on the part of faculty.
 - c. Result: if detailed knowledge of another legal system is the compelling reason, then, make upper level international and comparative law courses a required upper level course taught by faculty with expertise in that area.

³ Austin Sarat, Exploring the Hidden Domains of Civil Justice: “Naming, Blaming, and Claiming,” in *Popular Culture*, 50(2) DePaul Law Review 425 (2000).

⁴ *Supra*, note 2.

⁵ Katharina Pistor & Philip A. Wellons, *The Role of Law and Legal Institutions in Asian Economic Development 1960-1995* (New York: Oxford University press, 1999), p. 238.

2. Why integrate in the first year? As indicated by the above quotes: importance of legal system as a cultural system. Through its rules of court, a system of civil justice regulates how disputes are to be resolved; but these rules are also messages about what we think is just and fair.

a. Knowledge and details of another particular country's laws may prove useful, but is not be the only reason for integrating in first year. Rather, it is the process of comparative study that is important in helping a student understands that the U.S. legal system is one of many cultural systems, not the only system.

b. Faculty member need have some knowledge but need not be area specialist, as the inquiry is not why does country X have such a procedure, but rather, why does the U.S. have or not have such a procedure.

c. Difference between first years and upper levels – focus of first year is on developing critical thinking and analysis: comparative methodology assists in this lesson.

- learn to identify the critical elements about legal systems and the culture one is working in; learn to question basic assumptions that would be taken for granted in a domestic transaction. Why do defendants show up in court? How are judgments enforced?

- ultimately learn also to question one's own system's assumptions -- the gaze outward invariably turns inward. It helps us to better understand our own legal system as a cultural system. We examine American civil procedure comparatively in order to highlight the assumptions within our own system, rather than to teach the intricacies of another's legal system.

d. Increase student interest and decrease parochialism; increase creativity and remove blinders of tradition.

III. What are the possible methods and resources? Any first year teacher can take it on.

1. Depends on whether it's a year long or semester course. Separate units possible if more time; supplementary context if less time.
2. Focus on one or two countries (countries with English language materials, countries of economic power, countries with some commonality) – Japan and Germany, are the most frequently cited examples (see the bibliography below).
3. Select limited areas for comparisons – fertile areas include personal jurisdiction, legal profession and legal aid, pleadings, pre-trial, continuous vs. discontinuous trials, appeals; ADR
4. Select major international conventions, and ALI/UNIDROIT principles
5. Be wary of “the exotic other” syndrome. Do not focus only on the “exotic other” differences, draw consistent and possibly “universal” themes.

IV. Some recent English language materials on civil procedure and foreign law:

- Thomas Main, *Global Issues in Civil Procedure*, (West Publishing, 2005).
- Stephen Subrin & Margaret Woo, *Litigating in America: Civil Procedure in Context* (Aspen Publishing, 2006)
- ALI/UNIDROIT, *Principles and Rules of Transnational Civil Procedure* (Cambridge University Press, 2006)
- Kevin Clermont, “Standards of Proof in Japan and the United States”, Cornell Law School Research Paper no. 04-02-
- Richard L. Marcus, “Putting American Procedural Exceptionalism Into a Globalized Context,” *Am. J. Comp. L.* (forthcoming)

⁶ Lawrence M. Friedman, *Law and Society: An Introduction.*, 76.

⁷ Austin Sarat, Exploring the Hidden Domains of Civil Justice: “Naming, Blaming, and Claiming,” in *Popular Culture*, 50(2) *DePaul Law Review* 425 (2000).

⁸ *Supra*, note 2.

⁹ Katharina Pistor & Philip A. Wellons, *The Role of Law and Legal Institutions in Asian Economic Development 1960-1995* (New York: Oxford University press, 1999), p. 238.

¹⁰ Janet E. Ainsworth, *Categories and Culture: On the ‘Rectification of Names’ in Comparative Law*, 82 *Cornell L. Rev.* 19, 26 (1996).

¹¹ Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167, 215 (1983)

¹² Stuart Hampshire, *Justice is Conflict* (Princeton: Princeton University Press, 2000), p. 71.

- Neil Andrews, *English Civil Procedure* (Oxford University Press, 2003)
- Adrian A.S. Zuckerman, ed., *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*. (Oxford: Oxford University Press, 1999).
- Hiroshi Oda, *Japanese Law* (2nd Ed.) (Oxford: Oxford University Press, 1999)
- Carl F. Goodman, *Justice and Civil Procedure in Japan* (Oceania Pub., 2004)
- Kuo-Chang Huang, *Introducing Discovery into Civil Law* (Carolina Acad. Press, 2003)
- Peter L. Murray & Rolf Sturmer, *German Civil Justice* (Carolina Acad. Press 2004)
- Adrian Zuckerman, *Civil Procedure* (LexisNexis/Butterworths 2003)
- Jeffrey S. Lena & Ugo Mattei, *Introduction to Italian Law* (The Hague: Kluwer Law International 2002)
- Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press 2001)
- Alec Stone Sweet, Wayne Sandholtz & Neil Fligstein, *The Institutionalization of Europe* (Oxford: Oxford University Press 2001)
- Leslie Friedman Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context* (Baltimore: Johns Hopkins Press 2001)
- Ralf Rogowski & Thomas Gawron, *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court* (New York: Berghahn Books, 2002)
- Christina Biehesheimer & Francisco Mejia, *Justice Beyond Our Borders: Judicial Reforms for Latin America and the Caribbean* (Washington D.C.: InterAmerican Development Bank Publications 2000)
- Yuval Shany, *The Competing Jurisdiction of International Courts and Tribunals* (Oxford University Press, 2003)
- Arthur Rosett, Lucie Cheng, & Margaret Woo, eds., *East Asian Law - Universal Norms and Local Cultures* (London: Cruzon/Routledge Publishers, 2002)
- Stanley Lubman, *Bird in a Cage: Legal Reforms in China After Mao* (Stanford University Press, 2002)

