

## **Session: Is there a curricular core for the transnational lawyer?**

Paper: *Introducing Common Law and Civil Law.*

This paper essentially describes a subject taught in the first year of an LL.B degree.<sup>1</sup> Australian legal education is an education in common law. While developments in Europe have begun to have a major impact on English common law, and on undergraduate legal education in England, Australia is physically, politically and intellectually remote from these changes. There is little pressure as yet on most Australian lawyers to be able to work with civil law, and therefore little perceived need for legal educators to make sure that students can do this, or that they should have even a rudimentary understanding of civil law concepts and systems. While there has been considerable internationalisation and globalisation in legal education it has focussed on contacts with some parts of Asia, and on areas of commercial law, rather than on the basic grammars of other legal systems. Undergraduate curricula commonly include optional subjects<sup>2</sup> in international law and international business law. Graduate courses are widely available in the corporate and commercial law of various Asian countries. Both undergraduate and graduate courses in international Human Rights Law are common, and popular with students.

It was noteworthy to me that at the Commonwealth Law Conference in Melbourne in 2003 (Common Law/Commonwealth) leading speakers, including judges from England's highest courts, spoke of the common roots of European and English law. The old emphasis on the unique superiority and separateness of the common law has been re-narrated to fit seamlessly into contemporary developments in European law. But these new narratives have little meaning for Australian lawyers because without the institutional impetus of the European Union which is changing English common law and English legal education Australian law will not follow the new English path. Indeed Australian common law will soon but cut off in new ways from English

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<sup>1</sup> For the record I should note that the La Trobe program has other offerings relevant to transnational legal education: a Masters degree in Global Business Law and an LL.M International which offers an education in common law to lawyers from civil law jurisdictions.

<sup>2</sup> The LL.B degree taught in all Australian Universities contains a required core curriculum. The degree, along with articles of clerkship or a short period of Professional Legal Training, is all that is required for admission to practice. Most LL.B courses have room for optional subjects in addition to the required core. These options vary from University to University.

developments and, like many migrants to new countries, may eventually find itself with an idealised version of the home culture that bears little relationship to contemporary practices. The question then that remains is whether all Australian law students should be introduced to other legal systems, and how? If, in an era of internationalisation of law and legal practice, some knowledge of comparative law is deemed necessary, whose law and what level then becomes an issue.

Teaching a form of comparative law can be approached from different directions. It can simply be on a pragmatic level – e.g. these are the rules of their commercial and corporate law that you must know in order to do business with them. It can also be approached historically and philosophically. Comparative Law as an academic tradition has basically had a mixture of evolutionary and functional traditions. Other legal cultures or ‘families’ have been examined by western scholars to show them as precursors to developed law, while differences between developed legal systems have often been ironed away in efforts to show that they are really only different ways of achieving the same objectives. The approach to difference, particularly when comparing western legal systems, becomes one of emphasising the similarities underlying surface variations. As Ruskola has observed, functionalism, which has exhausted itself in the social sciences ‘retains a tenacious hold on the imagination of Comparative lawyers’. (2002: 189) Comparative approaches to ‘exotic’ legal systems (eg Islamic or Japanese) are clearly more likely to emphasise real differences.

The approach which we have taken at La Trobe Law has not been the simply pragmatic one, but nor has it been within the tradition of Comparative Law broadly conceived, being neither evolutionary nor functional in approach. Nor has it, in spite of some student interest, considered ‘exotic’ systems. We have used our introduction to Comparative Law purposively as a means of casting light on the assumptions, practices and doctrines of the Common Law. We thought it crucial that law students, particularly when the foundations of their legal education was being laid, should not only be given the view that the Common Law was ‘The Way’ of doing and thinking about law and that right from the start of their degree (which is basically an education in common law) they should at least have an element of the ability to stand back and view it as a distinctive legal culture – ‘A Way’ rather than ‘The Way’. We also thought that comparison was best done between the differences in law among western

industrial societies rather than through comparing Common Law or Western law generally with more exotic systems. This enables students to think about how and why similar societies with similar legal problems should approach them in different ways.

With these context-setting comments I now proceed to outlining a course we teach. As I have said there are no new professional pressures that necessitate the teaching of some principles of civil law to Australian students. The justifications must rather be a) intellectual, in that an element of comparative law enhances understanding of the common law, and also b) broadly internationalist in the sense of preparing students from the outset to encounter other legal cultures and systems.

The first six weeks of the semester (which I do not teach) follow directly on from a fairly generic first semester course which introduces students to court hierarchies and processes in Australia; issues of precedent and *ratio decidendi*; and to statute law and its interpretation. The second semester builds upon the picture of common law with a case law based examination of the processes of judicial reasoning. It starts with an examination of the role of judges in 'making law' and of issues of predictability. It considers the differences between, use of, and interplay between deductive and inductive reasoning in common law; the role of 'policy' and values in common law judgements; the differences between 'rules' and 'principles'. The case law considered is largely in the area of tort, with a secondary emphasis on contract, as the course serves as an introduction to the dedicated subjects in these areas.

By the time students reach the explicitly comparative part of the course they have had two thirds of their first year introduction to common law concepts and techniques. What then follows is deliberately contrastive (and in this way is somewhat different in tone from the approach taken in contemporary English legal education).

The comparative section starts by introducing students to the notion of legal culture: history; legal sources; institutions; ideology; discursive style and self image. It skates over the differing self images of common law and civil law. The place of Roman law in European legal development is discussed, leading into an outline of the circumstances of the production of the major European codes: the Revolutionary

origins of the *Code Civile*; and the German Empire and the *BGB*. The concept of Codification and this history of codification in the common law is also outlined. This enables contrasts to be drawn about the nature of, and origins of legal rules and concepts in common law and civil law.

The course then goes on to consider the different conceptual bases of public law in common law and civil law. Particular emphasis is put on the differing relationships between executive and judiciary, and the composition and status of the judiciary. The contrasts between the place and role of the judiciary following the English Revolution of 1688, and that of the French judiciary following the French Revolution of 1789 provides a basis for this discussion. Different public law concepts are also considered, with an emphasis on different ideas about the rule of law, the separation of powers, and judicial review of legislation and executive actions (contrasting the Diceyan constitutional world view with the European. ). Having dealt with the different relationship between judiciary and executive students are then introduced to the different purposes, styles and techniques of statutory drafting and interpretation in common law and civil law. The differences between common law judging and the use of precedent, and civil law code based judging without a formal doctrine of precedent is then considered. The different levels of detail in drafting, and the differing restrictive and purposive techniques of interpretation are discussed at some length.

With the public law framework outlined, the course then goes on to consider, in a deliberately contrastive fashion, the different legal processes in civil law and common law countries. The variations between the systems in terms of actual litigation (type, volume, expense, outcomes, and accessibility of processes) are outlined to give an empirical underpinning for the discussion of court hierarchies, appellate structures, and professional roles. Of particular interest to the students year by year has been the description of the different nature of civil law court processes in both criminal and civil matters, as the particular common law style of court process is one of the most deeply embedded cultural aspects of law. I think students have found it particularly illuminating to think about why the common law has come to take the attitudes to process that it does and to see how other systems' processes work.

In the case of criminal law emphasis is put on the contrasts between French and English/Australian processes: the different role of the state and the idea of the ‘search for truth’; the different nature of the investigation; the French *juge d’instruction* and the different investigative procedures and the use of the *dossier*; the different roles of oral and written evidence; the different order of trial process, the ‘right to silence’ and expert evidence; the different role of the jury and defense counsel; and place of the victims of crime in the process. The overall purpose of this is not simply to show that criminal trials can be properly conducted in a variety of ways, but to stimulate thought about why common law processes are like they are, which elements are of importance, and which simply idiosyncratic. Differing processes of civil litigation are also outlined, in particular a contrast is drawn between the orality of the common law ‘trial’ and the place of written documentation in civil law systems and the idea of ‘trial’ as single event as opposed to continuing process. The ‘active’ and ‘passive’ role of the judge is contrasted in relation to both criminal and civil law processes.

The sections which then follow build upon the students’ introduction to common law reasoning in the areas of contract and tort in the first six weeks of the course. A basic theme is the difference between inductive reasoning and analogy in common law, and the deductive methods of civil law. At the outset the idea of a law of obligations and the distinction between contractual obligation (voluntarily entered into in relation to specific parties) and legally imposed general obligations is outlined. The students are then introduced to the common law ‘objective’ basis of contract and the ‘subjective’ civil law basis, which depends on a meeting of wills, and the difference this makes in the matter of interpreting written contracts and admissible evidence in contractual litigation. A contrast is drawn between adversarial and non-adversarial views of contracting. The idea of ‘Good Faith’ is introduced with a discussion of *bonne foi*, *bonne moeurs*, and *treu und glauben* in the Code Civile and the BGB.

In the next section the law of delict/tort (general obligations; intention and negligence; wrongful acts and omission) is considered. Once again a deliberately contrastive approach is taken as it is an area which lends itself to this approach. Students have been introduced in the first part of the course to the way in which English law limped

towards a (highly qualified) acceptance of a liability for negligence.<sup>3</sup> The difficulties which the common law had in acknowledging a general obligation and the continuing confinement of the extent of the obligation is easily contrasted, of course, with CC 1382-1384. Well over a century before *Donoghue and Stevenson* French law codified its very broad principle of liability for all damage wrongfully caused.<sup>4</sup> The approach taken tries to consider why there is so large a difference in the principles according to which English and French law have approached liability for negligence, while also trying to explain how French law has developed in practice, in particular the expansion of liability under CC 1384. We then go on to consider the German approach to the law of delict focussing on BGB 823 and 826. Attention is given to the differences between common law (in its Anglo-Australian forms) French law and German law in relation to negligence; the duty of care; proximity; strict liability; *faute*; and invasion of interest. In particular attention is paid to differing approaches to causation.

The final section of the course is devoted to the delict/contract border country. It revisits the fact situation in *Donoghue and Stevenson* and considers the contractual approaches that may have been in French and German law. It considers the German concept *culpa in contrahendo* (fault in contracting) in relation to the well known cases; and French notions of *obligations de securite* and *obligations d'information*. In all these instances the question of how different legal systems use delictual and contractual approaches is discussed. The same approach is taken to the issue of negligent misstatement in civil and common law and the issues raised by incompetent professional advice. Overall the intention is to stimulate thought about why common

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<sup>3</sup> Lord Atkins' classic statement in *Donoghue v Stevenson* 1932 AC 562 in relation to 'persons who are *so closely and directly affected* by my act that *I ought reasonably to have them in contemplation* as being so affected when I am directing my mind to acts or omissions which are called in question...' will be familiar to any student of English or English influenced law.

<sup>4</sup> CC 1382 Any act of a person which causes injury to another obligates him by whose fault it occurred to make reparation.

1383 Everyone is liable for the injury he has caused not only by his act, but also by his negligence or imprudence

1384 A person is liable not only for the injury he causes by his own act, but also for that caused by the act of persons for whom he is responsible or of things under his guard.

law and civil law might differ in the way that they categorise similar fact situations and in the remedies that they offer. Recent and current developments in ‘expanding’ negligence in common law and ‘expanding’ contract in civil law are discussed.

This course clearly does not teach students how to be practitioners in a transnational legal world. It tries to sensitise them to the idea of law and legal systems as cultures. In one sense its aim is broadly ‘jurisprudential’ in that it tries to get students to think broadly about the categories and purposes of law. But I confess to some scepticism about theoretically and philosophically based jurisprudence and the approach taken here is stimulate reflection through a detailed look at doctrine, processes and historical contexts.<sup>5</sup> A longer course could deal with other fruitful areas of contrast. The different family and personal law (particularly for example laws of succession); or even more importantly, the different conceptual bases of the law of property would be just as illuminating. Much of my own recent reading has been on World Bank and other legal globalisers versions of what is needed in the way of legal reform in countries around the world. The authors of these materials could clearly benefit from a better and more reflective education in comparative law. The thinking behind the approach in the course I describe is to embed at the start of legal education the idea of law as culture; to try to move away from the powerful hold which the logic, methods and doctrines of common law establishes in legal education in common law countries. In this aim I find support from Curran, (1998: 657/8), who writes of curricula which ‘would aim to elucidate the sorts of inarticulate categorisations that permeate (states’) legal cultures’. and the ability to ‘challenge entrenched categorisations in one’s own and other cultures.’(658)

Perhaps the most significant aspect of the approach taken is that it is, as I have said, that it is deliberately contrastive and in this way it differs from a common approach to comparative law which has been to identify common approaches or functions in different legal cultures. Curran has claimed that ‘Comparatists inherited a fear of otherness than has manifested itself in an impetus to discover and proclaim sameness.’ (Curran, 1998: 666) My concern is that in educating lawyers for a transnational environment we might, especially as on the surface the world’s legal

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<sup>5</sup> I suppose it does fall in to what Twining (2000, Ch 7) calls the ‘country and western tradition’, but then I also admit to liking country and western music.

repertoire is shrinking, fail to make them aware of the different assumptions that lie behind laws which appear to be similar. It is also important to understand the difference between knowing that law is transnational (through the study of International Law; Human rights Law; International Business Law etc) and being aware of the cultural contingencies of one's own system. It is the latter, I suggest, that must underlie education of transnational lawyers.

## **References**

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