CHAPTER VI

Teaching Comparative Law to Undergraduates

The problem of teaching comparative law to undergraduate students in Indian law schools has assumed particular urgency in view of the Bar Council's requirement that the subject be studied compulsorily in courses leading to the LL.B. degree. There are one or two things to be noted at once about this requirement. First, the Bar Council does not lay down that the subject be taught as a separate *paper*. Probably, the Bar Council had in view Gutteridge's opinion that "There is no need to elevate comparative law to the dignity of a separate subject, with its own lectures, teachers and examination papers".[1] And probably, again, the Bar Council was inspired by Gutteridge's further formulation when it clubbed the subject with jurisprudence, and here we make the second point, namely: "It should be perfectly feasible to dovetail comparative instruction into one of the courses devoted either to the usual English law subjects, or, perhaps, to one of the cultural subjects, such as jurisprudence or conflict of laws".[2] In any case, Gutteridge's hint seems to have been well taken when the subject was made compulsory. The doyen had stated "that cultural subjects, unless they are compulsory, are apt to be evaded by the average student, sometimes because he finds them difficult, but usually because he is doubtful of their value to him in his subsequent career as a practitioner".[3]

The problems of teaching comparative law, nevertheless, remain. How does one make the student take interest in this so-called "cultural" subject? We have endeavoured to suggest in the preceding pages that, first of all, it no longer can be treated as a cultural subject, and that it has concrete utilitarian aspects which the teacher is well advised to highlight. The function, in short, of the teacher consists in making the "value" of comparative law apparent, and in making it, in fact, as practical as possible. At the higher and more specialized level little emphasis is required to promote credulity. Comparison is almost a *sine qua non* for research in law. Again, for attorneys in cosmopolitan cities handling transnational business, and for those seeking expertise in area studies knowledge of foreign law has a value which is evident. But, it is at the undergraduate level that the problem of comparative law instruction poses severe challenges. The teacher must make many decisions for himself; decisions in the field he wishes to teach, and decisions on the tools and implements he wishes to use in teaching it.

In order to facilitate the above task the Indian Law Institute organized a seminar on 27 and 28 December 1969. Thirty law teachers from

1. H. C. Gutteridge, *Comparative Law* 136 (1946).
2. *Ibid.*
3. *Ibid.*, 128.

all over India participated in the seminar. C.J. Hamson, Professor of Comparative Law, Trinity College, Cambridge University, England, who chaired the sessions has made available to the Institute a report based on the discussions held therein, which is reproduced as addendum at the end of this monograph. A number of teaching methods are critically discussed in this report. The present chapter attempts at summarizing Hamson's recommendations in the said report, with appropriate supplementary material at relevant places. Also, we have tried to refer to the materials that could be used at the end of the discussion of each method. A preliminary observation, however, on Hamson's report needs to be mentioned before we come to the actual methods.

A point was made by a number of delegates to the seminar that comparative law, in a way, was not new to Indian Law Schools, and that a certain amount of comparative study already existed in individual courses. For instance, it was pointed out, that in courses on Constitutional Law reference was necessarily made to British experience as well as to American, Canadian and Australian Constitutions. Similarly, it was stated, in courses on administrative law reference was commonly made to the French legal system; and in the study of family law the Hindu and Muslim systems were perforce presented juxtaposed to the student. Gathering the impression that such comparison was often superficial and inadequate, Hamson recommended "that every effort should be made to extend and deepen within the limits of the possible the comparison which is appropriate to individual existing courses." He expressed the feeling, however, that such comparison in individual courses "is scarcely likely to be sufficient" for academic purposes.

Proceeding from the above assumption Hamson went on to examine as to what separate and specific teaching ought there to be of comparative law as such. In his prefatory remarks Hamson stated categorically that it was clearly not possible and was undesirable to seek to establish a standard pattern of teaching comparative law. He thought it "more sensible to call attention to a number of different possible methods, the choice between them, or any other possible method, being left to the judgment and to the resources of each law school."

Method I

Probably conscious of Gutteridge's recommendation, and certainly keeping in view the Bar Council's prescription in this regard, some members pointed out in the seminar that comparative law could be taught, and was in fact being taught in some law schools, *in conjunction with the course on Jurisprudence*. Quite a few resolutely and vehemently opposed such linking. Hamson thought that whilst such teaching might not be the best and not the one which he preferred most, it could be a possible way of beginning comparative study. It was, in Hamson's opinion, in some ways the line of least resistence. If one chose this method, he suggested, it might then consist in explaining the scope and purpose of comparative law, its purpose and its history. Gutteridge's book would be useful in this respect.

Another alternative to this method of teaching, according to Hamson, could be by selecting some principal topics or institutions discussed in Jurisprudence, for example sources of the law, the place of custom, the judicial institutions, etc., and examining them in the light of the material provided by the relevant parts of a book such as that of David and Brierley's *Major Legal Systems in the World Today*. That Hamson thought would be

"a feasible, and in many respects a commendable, way of starting a comparative study, a great advantage being that it avoids the difficulty of finding appropriate materials since they are collected together in one book."

A number of other jurisprudential topics, we submit, could be culled out from David and Brierley's book for comparative instruction, for example, the historic evolution of law, the imperative character of law, the judiciary, the significance of judicial precedents, the place of tradition, and so on. The book could be used in innumerable ways—and that is its great advantage. However, these are not the only topics that could be taken up if one chose the method of teaching comparative law in conjunction with Jurisprudence. Some American law schools have already experimented this combination. Ehrenzweig at the University of California has done this to produce a new course of "Comparative Jurisprudence" so as to emphasize the relation and interdependence of the two subjects.[4] It is not uncommon to find such offerings in comparative law courses: "Law and the State", "Law and the Individual", etc.

In order to assist the teacher with the jurisprudential bent of mind a brief list of reading material is proposed in the classified bibliography appended at the end of the Monograph. One or more topics could be selected from out of these and given a comparative treatment.

Method II

The second method of teaching comparative law can be the one adopted by the French law schools, namely, *a course on the major legal systems of the world.* Rene David's book, again, could be used for this purpose. We find in this book series of chapters giving concise and precise introductions to the legal systems of *e.g.*, the "Romano-Germanic family", Socialist Laws, the Common Law, Muslim Law, Law of India, Laws of the Far East (Chinese & Japanese), and Laws of Africa. Another book on similar lines, but painting the canvas in greater detail, is *Traite' de droit compare* by Arminjon, Nolde, and Wolff. But since this has not been translated into English as David's book—which was written originally in French—it has no practical utility in Indian Law Schools. One must not fail to mention the Max-Planck Institute's (Hamburg) conception of an *Encyclopedia of Comparative Law* consisting of 14 volumes, the first it is understood, is being devoted to the discipline and the rest to comprehensive analytical-descriptive studies of different legal systems of the world.

Listing the advantages of adopting this method Hamson had this to say in his report:

> "To follow this line would have the advantage of adopting a course of study which, though no doubt elementary, has the approval of a first class set of law schools, and one which has been tried and found practicable. And again the great difficulty of material would be overcome, since the course could be based on a single prescribed book. Again, such a course of comparative study has much to commend. The survey of major existing legal syetems (which Professor David conducts with considerable simplicity as well as with considerable insight) is certainly calculated to broaden the student's intellectual field and may induce some to take, later on, a more profound interest in one particular legal system or in some aspect of it."

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4. See Joseph Dainow, "Teaching Method for Comparative Law", 3 *J. Legal Educ.* 388-402 (1951).

Commenting upon David's book, Hamson went on to make the further interesting point that if the book was to be used the portion dealing with the Common Law systems ought *not* to be omitted, for, "It will be of particular importance to the education of the student of a system based on the Common Law and to his initiation with the value and scope of comparative study, to see what a comparative lawyer of the standing of Professor David has to say about the Common Law itself." The same point was made by Rheinstein also. "[T]he book", said Rheinstein, "should be highly useful not only because of its information on the Civil Law systems and the laws of the East, but also because it illustrates how our law looks to an acute and well-informed foreign observer."[5] On the same reasoning we may recommend that the portions dealing with the Hindu and Muslim laws in the book must be retiained—if this method is adopted to teach comparative law and if David's book is adopted as a text book-despite the fact that David's treatment of these subjects is elementary.

Grave doubts might be expressed as to whether it would be feasible and whether it would be desirable to attempt to teach the student of LL.B. with the information about *all* the major legal systems of the world. As regards the question of *feasibility*, the very fact that the French law schools have found it so is sufficient answer. On the not unreasonable presumption that the Indian students' level of comprehension as well as curricular work-load are not in any way lower or higher than those of the French, there is no reason why we cannot adopt this method. The further argument about the *desirability* of cramming the undergraduate with the information about all the major legal systems of the world today, it must be said that one does not propose to give out *all* the information about *all* the systems, but only salient features. Since the work has already been done admirably by a highly—rated comparatist in admittedly "concise and precise introduction", this argument also loses its sting. Moreover, what one aims to achieve at this level is not to teach the student the position of torts in Germany and the law regarding undue enrichment in France, but only a broad view of the major legal systems to make him realize that there are more than one way of doing things, and also with a view to attract the attention of the more intelligent to pursue, if he wishes, a more sophisticated examination of a particular feature of a particular system at post-graduate level.

Method III

Daunted, perhaps, by the vastness of the scope involved in the above method, some members suggested in the seminar that comparative study should be based upon the study of one carefully selected foreign system only. Though theoretically it looks an attractive proposition the practical difficulties are great. Suppose a teacher chooses—as he is entitled to choose—one of the French, Soviet, Chinese, or Japanese systems, the first thing he will be called upon to do is to acquaint himself with that system rather thoroughly. That he can scarcely do by private study of one or two general books on that system. To be able to enter into a meaningful comparison of a particular feature of law of his own with that of the other he should have a mastery of both. Also, he should have at hand material on the foreign legal system. It is doubtful if our Universities are in a position either to build up such expertise either in men or material. Perhaps an organization like the Indian Law Institute, placed happily as

5. Max Rheinstein, "Teaching Tools in Comparative Law, A Book Survey", 1 *Am. J. Comp.* 1, 108 (1952).

it is in resources, could aim at such a programme. Indeed, if it does that, it could evolve into a centre for training and research in a chosen foreign legal system.

At the LL.B. level this method would prove impractical. Such are perhaps the reasons why Hamson was reluctant to recommend this method. In his words :

> "Theoretically and academically I agree with this view—it is the manner in which I attempt to teach comparative law in Cambridge myself, in a course entitled 'English and French legal methods'. But the course is directed to a selected group of fourth year (post-graduate) students who have access to a library relatively rich in French legal material (in French). I personally doubt if it is possible to give such a course to LL.B. students. The effort to prepare and make accessible material in English would be considerable and might be expensive."

Yet, if an individual teacher wished to make the effort and the experiment, stated Hamson, he should of course be encouraged to do so. Hamson, however, would not recommend the proposal as one to be generally attempted. For the benefit of such enterprising teachers we suggest a list in the bibliography.

The relative merits of the second and third methods are not far to seek. In the case of the second method the aim is to offer to the undergraduate a panoramic view of the major legal systems of the world, which in turn is expected to widen the horizons of the student. One can hardly achieve that aim if one chose the third method. That method is best suited to activate the critical faculties of the student. It is too much to expect from a student at the undergraduate level. Moreover, the third method presupposes a high degree of mastery of one's own legal system. This could be an ideal solution for post-graduate teaching. As a test of the critical faculties of the LL.M. student a dissertation on a carefully selected subject could also be prescribed.

Method IV

The fourth method recommended highly by Hamson would be based upon the selection of one or more topics which are judged by the teacher (and hopefully by the student also) as particularly important from a *specifically Indian* point of view. Hamson felt that though this method may seem to be very attractive it would be relatively more difficult to prepare. This would require, said Hamson, a survey, by the individual teacher, of those areas or institutions of the law which appear to him to cause special trouble in the Indian legal system considered as a going concern seeking to operate an effective social control over its actual environment. Despite some hesitations in listing such topics himself Hamson made very useful suggestions in this regard. The whole passage, for obvious reasons, is reproduced herewith :

> It would he out of place for a foreigner to attempt to specify such topics, but if one may extrapolate from one's own experience as a comparative lawyer, the list is likely to include such items at the administration of justice, the control of the executive, labour relations, or to take the title of a Cambridge paper 'The Individual and the State'. Under the administration of Justice there would fall to be

> considered (if relevent) such questions for example as the recruitment of the judiciary (is the English type of judge the kind of judge most appropriate to the Indian scene?—what other types of judiciary are known in the world?—if the English type is judged the most appropriate are the circumstances such as are calculated to secure his continuance? If not, what alterations are essential?) the method of trial (is the day in court type of process most suitable to civil as well as criminal trial, with similar alternatives as above) the method of bringing to trial a person accused of crime (is a proper equilibrium maintained by the existing process between the need to preserve individual liberty and the necessity of protecting the public interest). The list would also contain items of apparently humbler import—for example, is the existing law of contract calculated to secure the reasonable expectations of contracting parties, with reference perhaps particularly to standard form contracts.

Writing about the merits of this fourth method of teaching Hamson made an important observation that it would have the over-riding advantage of attracting the participation of the teacher himself in active comparative study on a topic which *he* considered important. Another advantage of this method, we might add, is that it would allow a number of variations for teaching to students of different levels. That is, it could be used to teach the LL.B. student with a vigorous selection of one or two topics, compared with one or two legal systems. The subjects and systems could be increased at the LL.M. level. Of course, this is the only useful method for research. What is more, as Hamson pointed out, this method would provide a link between comparative study at the LL.B. level and more advanced comparative study.

The only obstacle to this method of teaching would be availability of material. Hamson had a number of very useful suggestions to offer for the production of precisely such material. He envisaged a role of "initiation and response" for the Indian Law Institute, involving as it were harmonization of individual efforts by interested teachers and further recommended collaboration between the Institute and teachers.

Tentatively, however, we have suggested in the bibliography comparative material on a few topics proposed by Hamson himself. And for the benefit of the more enthusiastic who wish to explore new pastures we refer to the bibliography prepared by Szladits and published by the Parker School of Foreign and Comparative Law (a whole set of which is indispensable for all law schools in India).