Global Business & Development Law Journal

Volume 26 | Issue 1 Article 6

2-1-2013

When Intercultural Competency Comes to Class: Navigating Difference in the Modern American Law School

Rachel Moran

When Intercultural Competency Comes to Class: Navigating Difference in the Modern American Law School

*Dean Rachel Moran**

Presented on August 8, 2011 at the 2011 Pacific McGeorge Workshop on Promoting Intercultural Legal Competence (The "Tahoe II" Conference) in Lake Tahoe, California.

I. INTRODUCTION

I am grateful to Dean Elizabeth Rindskopf Parker and the Pacific McGeorge Global Center for Business and Development for including me in this event, the second conference designed to prepare law students for practice in a global legal marketplace. The first conference focused on the substantive mastery of international and comparative law,[1] while this one addresses questions of intercultural legal competency.[2] In moving from law-on-the-books to law-in-action, legal educators face new challenges about the meaning of culture, its relationship to law, and the special difficulties that arise when cultures and legal systems come into contact. These complexities, in turn, make the task of setting pedagogical goals and devising instructional techniques for our students all the more complicated.

Volumes and volumes have been written on the matter of culture, and there is no way to do justice to that sprawling literature here. However, it is worth noting that culture is a deeply contested concept, and the indeterminacy of the term can be a source of frustration for students in courses that tackle intercultural issues. In Denmark, for example, students in an international business degree program expressed their frustration with the way that culture was used to explain everything and nothing.[3] As one student put it, "culture was loose, abstract, and widely applied as explanatory."[4] As a result, the members of the class were not certain what they gained from an abstruse and elusive notion of culture. Instead, they wanted examples of real-world problems that could be solved—or at least better understood—by mastering intercultural competency. One student insisted,

* Dean and Michael J. Connell Distinguished Professor of Law, UCLA School of Law. I would like to express my appreciation to Gregory Davis for his research assistance.

1. Franklin A. Gevurtz et al., *Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 267 (2006).

2. Franklin A. Gevurtz, *Report Regarding the 2011 Pacific McGeorge Workshop on Promoting Intercultural Competence (The "Tahoe II" Conference)*, 26 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 63 (2013).

3. Maribel Blasco, *Cultural Pragmatists? Student Perspectives on Learning Culture at a Business School*, 8 ACAD. MGMT. LEARNING EDUC. 174 (2009) (exploring students' perceptions of the way that culture is taught in an international business degree on the basis of a study carried out at a major school in Denmark).

4. *Id.* at 179.

"We need more practical applications, no doubt the teachings are challenging, useful and highly relevant, but all of this is no good if one can't express nor apply all of this great new knowledge and convince the rest of the world that it is in fact useful and helpful."[5] So, the first lesson here is that it is important not to become so mired in the theoretical debates over culture that the relevance of intercultural competency to resolving real-world dilemmas is lost.

For law schools, there are other reasons to worry about how culture is defined. Most courses on intercultural competency focus on cultures in general, but for the practicing attorney, legal cultures may be relevant in their own right—creating expectations about the process for administering justice and applying legal rules that can lead to cross-cultural confusion or misunderstanding. Consider, for instance, the field of legal ethics. Ethical standards are considered a touchstone of professionalism, an essential element of defining oneself as a lawyer. Yet, there has been little success so far in creating universal codes of conduct that transcend national borders. The American Bar Association ("ABA") declined to apply the Model Rules of Professional Conduct to instances of transnational representation.[6] According to the ABA, these rules are domestic standards that pertain to jurisdictions in the United States, but have no clear authority in the realm of cross-border practice. Instead, parties must rely on choice of law rules under agreements among countries or international law.[7] The International Bar Association ("IBA") adopted an international code of ethics in 1956, but it has never been binding anywhere in the world.[8]

The European community has pursued a different approach by developing a code of conduct for lawyers who practice across international borders.[9] Although portions of the Code of Conduct for Lawyers in the European Community prescribe norms that govern all Member States, many provisions defer to Member States' rules.[10] In doing so, the European code recognizes the inherent pluralism of ethical codes in different countries, and it chooses a kind of moral relativism—at least in some domains—to cope with this diversity of perspectives.

5. *Id*. at 180; *see also* Susana Eisenchlas & Susan Trevaskes, *Intercultural Competencies: Examples of Internationalizing the Curriculum Through Students' Interactions*, *in* LEARNING AND TEACHING ACROSS CULTURES IN HIGHER EDUCATION 177, 180-81 (D. Palfreyman & D. McBride eds., 2007).

6. Ronald A. Brand, *Professional Responsibility in a Transnational Practice*, 17 J.L. & COM. 301, 306, 309 (1998).

7. *Id.* at 306; Lauren R. Frank, *Ethical Responsibilities and the International Lawyer: Mind the Gaps*, 2000 U. ILL. L. REV. 957, 959-61 (2000).

8. INT'L CODE OF ETHICS (Int'l Bar Ass'n 1988); Brand, *supra* note 6, at 308.

9. John Toulmin, *Commentaries: A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INT'L L.J. 673, 674, 685 (1991) (noting that the code builds on earlier work by the ABA and IBA, but also recognizing that the ABA could not adopt a similar approach given the federalist system in the United States).

10. Frank, *supra* note 7, at 963.

These divergent approaches to the question of legal ethics in a global marketplace alert us to yet another feature of intercultural competency: the ways in which defining such a competency touch on the very nature of membership in the world community. Some globalists have embraced a vision of cosmopolitanism in which we transcend our attachment to the nation-state. As Martha Nussbaum put it, "[we must aspire to be] a citizen of the world."[11] Yet, the very term "intercultural" suggests that we do remain rooted in certain national, regional, and local practices that require us to navigate cross-cultural boundaries. If this is so, then we should assume that pluralism—rather than a set of transcendent universal norms—will be an inevitable feature of our professional existence. The challenges then becomes how best to traverse our differences.

In deciding how to deal with difference, educators must consider both the normative and instrumental considerations that animate current conversations about intercultural competency. For some, embracing difference is a moral imperative rooted in principles of liberty and equality. Even before the current preoccupation with globalization, American law schools grappled with group differences based on race, ethnicity, class and religion, to name but a few. These concerns have been central in preserving fundamental values and upholding the rule of law.[12] Based on demographic shifts, America's population is likely to grow increasingly diverse, creating additional pressures to ensure that law school graduates master intercultural competency for the sake of a responsive law and a robust democracy.[13]

These moral concerns are especially significant when difference correlates with minority status and unequal treatment. But intercultural competency can serve functional purposes as well—purposes that are germane, whether or not conditions of discrimination and oppression are present. Regardless of a client's status, attorneys who can listen carefully and communicate clearly will deliver superior legal representation. These skills may be tested in important ways by a cultural divide between the lawyer and client. As a result, a hallmark of clinical

11. Martha Nussbaum, *Patriotism and Cosmopolitanism*, BOSTON REV. (Oct./Nov. 1994), http://bostonreview.net/BR19.5/nussbaum.html.

12. Kim O'Leary et al., *Cultural Competence as a Professional Skill*, *in* REFLECTIONS OF A LAWYER'S SOUL 175, 175-77 (A. Timmer & N. Miller eds., 2008); *see also* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33, 36 (2001) (explaining that legal clinics may teach cross-cultural perspectives and skills to enable students to help build a more just legal system).

13. Cynthia M. Ward & Nelson P. Miller, *The Role of Law Schools in Shaping Culturally Competent Lawyers*, 89 MICH. B.J. 16 (2010); Ronit Dinovitzer et al., AM. BAR. FOUND. & NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 35 (2009) (finding that of 4,160 graduates who passed the bar in 2000, 44% had engaged in some work that could be described as international); Susan L. DeJarnatt and Mark C. Rahdert, *Preparing for Globalized Law Practice: The Need to Include International and Comparative Law in the Legal Writing Curriculum*, 17 J. LEGAL WRITING INST. 1, 20 (2011) (describing a 2009 survey of the Philadelphia bar, which found that 67.5% of 1,050 respondents from a wide array of practice areas had worked on a legal matter requiring some knowledge of foreign or international law).

education has been the commitment to teaching law students how to understand a client's needs and desires, even when that client hails from a very different background. Students must be attentive, keep an open mind, and fully appreciate a viewpoint that initially may be quite divergent from their own.[14] Transcending parochialism to deliver good legal advice is similarly important when the attorney and client are doing a major cross-border transaction. The attorney cannot simply assume that everyone has the same expectations about the deal, and very often, routine boilerplate that would work in one country will have no application in another.[15]

At a minimum, then, lawyers must grasp the varied legal rules and processes that apply in different countries, but to be truly competent as an intercultural matter, attorneys must acquire a set of skills that allow them to navigate difference. The question is how best to impart these skills. Here, I focus on formal instructional methods, although I recognize that informal interactions also can be important in developing these capacities. Today, many American law schools welcome LL.M.s from around the world, and these students can be important resources in broadening an understanding of law and legal cultures beyond our own borders. Standing alone, however, this ad hoc approach is unlikely to be sufficient.[16]

In thinking about formal commitments, it is important to note that clinical educators already deploy a range of techniques to inculcate lawyering skills, and there is likely not to be any one right way to teach intercultural competency. Some would like to see these skills infused into all or most courses in the curriculum.[17] Critics worry, though, that any such mandate could disrupt the faculty's freedom to set goals and priorities for the substantive material that they teach. Reluctant professors might do a superficial job of dealing with intercultural competency, which in turn might marginalize these skills even as they were officially integrated into much of the curriculum.[18]

14. *See* Bryant, *supra* note 12, at 38-48 (describing examples of cultural differences between clients and their lawyers causing different perceptions with significant implications on lawyering choices).

15. *See* Duncan Bentley & John Wade, *Special Methods and Tools for Educating the Transnational Lawyer*, 55 J. LEGAL EDUC. 479, 481-82 (2005); *see also* Ilhyung Lee, *In re Culture: The Cross-Cultural Negotiations Course in the Law School Curriculum*, 20 OHIO ST. J. ON DISPUTE RESOL. 375, 409-15 (2005) (giving an example of how applying a culturally appropriate solution instead of a standard U.S. legal approach to copyright violations by a Korean company resulted in a more satisfactory outcome).

16. *See* LAW SCH. SURVEY OF STUDENT ENGAGEMENT, 2011 ANNUAL SURVEY RESULTS, NAVIGATING LAW SCHOOL: PATHS IN LEGAL EDUCATION 14-15 (2011), *available at* http://www.lssse.iub.edu/pdf/2011/2011_LSSSE_Annual_Survey_Results.pdf (indicating that J.D. students reported that their overall interaction with IGLS [international graduate law students] was "quite limited"); Carole Silver, Getting Real About Globalization and Legal Education: Potential and Perspectives for the U.S. (Nov. 21, 2012) (manuscript on file with author).

17. Gevurtz, *supra* note 2, at 87-93.

18. *Id*. at 94-98; *see* A.G. Cant, *Internationalizing the Business Curriculum: Developing Intercultural Competence*, 5 J. AM. ACAD. BUS. 177, 181 (2004) (explaining that infusing international case studies and chapters in a business school curriculum does not allow students to examine the impact of culture on

Perhaps cognizant of these difficulties, some institutions have used an immersion approach. Business schools have been ahead of law schools in responding to globalization by relying on this method. For instance, the Wharton School has a global immersion program that enables students to delve deeply into the culture of another country.[19] Students begin with a four-week series of academic lectures, which are designed to acquaint participants with the history, politics, and culture of the nation. Members of the class then go to the country they have studied for four weeks, and after their return, they write papers about their experiences.[20] Although students express considerable satisfaction with this course, critics worry that immersion courses treat intercultural competency as a discrete, segmented part of the curriculum.[21] By contrast, infusion makes clear that, in general, intercultural competency is integral to being a well-prepared professional.

Yet, a third method relies on a concentration or specialization that prepares students for global practice and includes intercultural competency as a component of the training. One objection to this approach is that it treats these skills as relevant only to those who anticipate pursuing an international career when, in fact, many graduates will encounter cross-cultural dilemmas—whether because they have immigrant clients, because they become involved in a cross-border dispute, or because they switch to a career that has global reach.[22] In short, some educators worry that even this strategy, which stops short of infusion, but expands beyond a single immersion experience, is too compartmentalized to serve law students well.

Of course, there are limits to what any law school can accomplish in three years. So, it is worth considering whether there should be training programs for lawyers who wish to hone their intercultural competencies after graduation. These programs would likely focus on particular areas of practice—in all likelihood, of a business or commercial nature—and so would emphasize the knowledge and skills needed to thrive in those fields. Here, the instrumental motivation for developing intercultural competency would undoubtedly

international business operations); *see also* Gary D. Praetzel, *Pedagogical Recommendations for Internationalizing the Undergraduate Business Curriculum*, 5 INT'L ADV. ECON. RES. 137, 139-40 (1999) (noting limited success of efforts to internationalize general business or campus curricula).

19. Elizabeth A. Tuleja, *Aspects of Intercultural Awareness Through an MBA Study Abroad Program: Going "Backstage"*, 71 BUS. COMM. Q. NEWS 314, 317-18 (2008).

20. *Id*. at 318-20.

21. *See id.* at 315 (describing limitations of study abroad programs as being "business heavy yet interculturally lean"); *see also* Cant, *supra* note 18, at 181 (referring to specialized international courses as having little more than "curiosity value" for students, distracting them from grasping the complexity of a global commerce).

22. *See* Bryant, *supra* note 12, at 38-39 ("Almost all professions and businesses now recognize the importance of building cross-cultural skills . . . As our world becomes more interactive, lawyers and clients inevitably will interact with those who are culturally different."); *but cf.* Cant, *supra* note 18, at 181 (arguing that a specialized degree or major is the best model for business students but that the classes must be tailored to students' needs rather than merely borrowed from existing offerings in other departments).

predominate. Indeed, even before graduation, students may be motivated mainly by the functional advantages of mastering intercultural competency. At the Wharton School, for example, students who participated in the global immersion program focused almost entirely on business culture and tended to ignore larger questions of politics, society, and history.[23]

To the extent that law schools want to inculcate some sense of moral and professional obligation among lawyers as members of the global community, those lessons will likely have to be taught before, and not after, students graduate. But precisely what these lessons might be remains contested. For some, the imperative is to spread universal norms of social justice around the world.[24] For others, this is a questionable form of cultural imperialism.[25] Some believe that adaptation to other cultures must be the goal, but critics see this as an abdication of the responsibility to ameliorate the injustices perpetrated against the powerless and vulnerable.[26] Still others search for some middle ground between the absolutism of universal norms and the uncritical acceptance of a purely relativist approach.[27] Because law reflects foundational values and builds the architecture of self-governance, these moral dilemmas present fundamental challenges for law schools seeking to teach intercultural competency to their students. Yet, even having the debate could be a highly instructive exercise for students confronting the dilemmas that globalization poses for law and lawyers.

II. CONCLUSION

As this brief account makes clear, efforts to bring intercultural competency into American law school classrooms are just beginning. The pressures of globalization lend a sense of urgency to an event like this one, which struggles to concretize a term that often serves as little more than a cipher for anxieties about the role of law in a complex and changing world. Even if the work done at this conference cannot give us all the answers, the dialogue can help us to ask the right questions. In time, perhaps, we will see a range of curricular innovations

23. Tuleja, *supra* note 19, at 330-31.

24. Jonas Stier, *Internationalisation, Intercultural Communication and Intercultural Competence*, 11 J. INTERCULTURAL COMM. 1, 3 (2006) ("*Idealism* draws from a normative assumption that internationalisation is good *per se*. It serves to highlight global life-conditions and social injustices and offers an emancipatory worldview.").

25. *Id.* at 4 ("*Instrumentalism* considers internationalisation as a viable road to profit, economic growth, sustainable development or ideological goal-attainment of political regimes, multinational corporations or interest groups.").

26. Victor J. Friedman & Ariane Berthoin Antal, *Negotiating Reality: A Theory of Action Approach to Intercultural Competence*, 36 MGMT. LEARNING 69, 75-77 (2005); *but see* Michael Paasche-Orlow, *The Ethics of Cultural Competence*, 79 ACAD. MED. 347-50 (2004) (stressing the significance of the distinction between cultural competence and ethical relativism).

27. Bryant, *supra* note 12, at 35-37 (describing how she and her collaborator developed a curricular approach that strikes a balance between macro-level concerns about social justice and micro-level concerns about good lawyering in a particular case).

that test and refine the meaning of intercultural competency. Those efforts, in turn, can inform the next conversation we have about the challenges in navigating the differences that face legal education and the legal profession.