Maria M. Kenig-Witkowska
University of Warsaw

TO TEACH OR NOT TO TEACH – WHY WE DO NEED TO TEACH FOREIGN LAW AND FOREIGN LEGAL SYSTEMS AS WELL AS COMPARATIVE LAW METHODS IN A GLOBAL WORLD?

I

This, formulated in Shakespearian style, question in the title of our session, in my view is of rhetorical type, and the answer should unconditionally be positive. Yes, we do need to teach foreign law for many reasons. I will attempt to address this complex and at the same time simple question in some brief observations[1].

One of the reasons that I place this issue on the list of important ones is the students' interest that finds its reflection in a number of schools of foreign law at Polish universities, including the Faculty of Law and Administration of the University of Warsaw. Students are ready to learn foreign law and appreciate very much the certificates of completion. They do it for many reasons, e.g. scientific curiosity, but they also perceive it as one of the major elements of legal education contributing to their professional career. Young lawyer who learned just the basics of foreign law system will certainly have more chances for professional success in a globalizing system of legal turnover.

To prove the validity of this standpoint, I would also like to refer to one of my experiences of teaching American students the European Union (EU) environmental law at the Florida University in Gainesville and at the Georgia State University in Atlanta. When I concluded my course, they underlined with satisfaction, that once they learned the basics of the EU environmental legal order, they believed they would be able to tackle any EU Member States' case when the EU environmental legal issues appear.

[1] This paper does not pretend to be an in-depth analysis of the issue. Therefore, in my view, it should be continued on a broader scale by those academics who strictly deal with methodological issues of law studies.

II

The usefulness of knowledge of foreign legal systems is obvious both for practitioners and researchers of law, and not only in the context of the flagship example of international private law which concerns relations across different legal jurisdictions between persons, and sometimes also companies, corporations and other legal entities, judges, barristers, prosecutors, but also for the administration on various levels, etc. In our increasingly globally linked world, teaching foreign law needs to take an ever more crucial role. With the rise of important new developments over the last thirty years, like the proliferation of the computer and Internet, development of global capital markets, international trade, human rights protection, global governance of environmental change etc., we are more and more linked in common ways, which makes knowledge of foreign law a must.

III

The remarks I would like to make are based on my academic career as a professor of law in Poland as well as on my experience as a visiting professor at foreign universities in Asia, Africa, including the American ones, where I had an opportunity to teach the EU environmental law.

At the start of my lecturing in the United States, I have quickly realized that American students have perceived the European Union as a political entity somehow similar to the United States of America, therefore trying to compare legal acts of the EU with the federal legislation of the USA. I also realized that, for them, such terms like directive, resolutions or decisions had different meanings based on what they understood from the American legal system, especially in the context of harmonization and unification issues of the European Union law. Although my main topic was the EU environmental law, I had to give them a short course not only of the EU institutional law but also of some international law issues, in order to show them the place of the EU legal system in the normative system of international relations. The lesson learned from this experience is that before we start teaching any specific topic of national or the EU law, especially in a country outside Europe, some lectures on the system of the European institutional law should be considered as a prerequisite for further teaching, to provide students with necessary tools for interpretation of the EU law.

IV

Having in mind this perspective, foreign law should be taught abroad and one has to do it using comparative law methods. Making the process of teaching

foreign law a productive one brings me to the topic of the role of comparative law[2]. In general, the quintessence of comparative law is to compare law of one country to that of another. However, of course, the comparison can be broader and encompass more than two laws and more than written words. In addition, perhaps, some degree of common approach, if not a measure of common understanding should be considered, because the knowledge obtained through comparative law can be taken as a door to foreign legal culture. These findings can be applied to our own legal culture, helping to understand different perspectives that may result in deeper understanding of our own legal order. From my experience as an academic and as a lawyer-practitioner it is not enough simply to compare the words written on the page, because law is deeply rooted in culture and it both derives and is influenced by the culture of the home country. Therefore, we must look at foreign law in a complex way, searching to understand better what the law really is, and how it functions within a society. To do this, we need to explore the elements of the forces that influence law, like religion, history, geography, ethics, custom, philosophy or ideology, just to name a few from among many. These short remarks on the role of comparative method reveal that comparative law has much to offer as a perspective to various solutions for vital policy issues. It can be quite useful to look outside our national legal frontiers to see if other perspectives could constitute valid points when it comes to policy questions. Alternative views on important, from the legal point of view, policy issues can, in turn, force a fruitful reassessment of these issues and therefore, lawyers need comparative law to take on these broader tasks.

To conclude this part of my humble remarks, I would like to say that it is absolutely clear for me that comparative law is an important legal tool, according to contemporary tendencies in methodology of legal sciences that have developed over the last thirty years, such as e.g. law and economics. Furthermore, comparative law must take on broader missions since we need to explore foreign cultures more deeply. It results from our own experiences that we need to step outside our own national perspective to see if we can learn more from different cultural and social patterns. Looking outside our own perspective, we might have a major influence on e.g. stewardship of the earth's resources, where comparative law as a tool has to be used to help to look insight major public policy issues to figure out what and how to act in our globalized world. Undoubtedly, comparative law has an important role to play here since we need to take on these new tasks as a way to improve our legal order, whether national, regional or international.

[2] E. J. Eberle, *The Method and Role of Comparative Law*, "Washington University Global Studies Law Review" 2009, Vol. 8, No. 3, pp. 451 and next. For the Polish approach to the issue see R. A. Tokarczyk, *Legal Comparative*, Warsaw 2008.

V

Talking about comparative law, let me say a few words on comparative international public law, the term introduced by A. Roberts, to which I would like to refer and make some remarks on the central issue when it comes to considering the use of comparative method in international public law – why to teach international public law[3].

The shortest answer why to study, to teach and to learn the comparative international public law is because of the role of national courts in creating and enforcing international law, which is a normative system of international relations. Academics, practitioners and international and national judges are increasingly seeking ways to identify and interpret international law by engaging in comparative analyses of various domestic court decisions, especially when we are dealing with the norms of *erga omnes* and *ius cogens* character. This emerging issue, known in the doctrine under the term of comparative international law, connects, as A. Roberts rightly points, international law as a matter of substance with comparative law as a matter of methodology[4]. The comparative process in this field is a very important one because of the role that national court decisions play in international law doctrine of sources, under which they provide evidence of the practice of States and, at the same time, constitute subsidiary means for determination of rules of law.

This role of national courts' decisions has a significant impact on the development of international public law. National courts in many countries are called upon to consider and resolve issues, based on the correct understanding and application of international law. This significance of international law in national courts' judgments requires consideration of the importance of domestic judicial decisions in the development and enforcement of international public law. Academics and international courts judges frequently identify and interpret international law by engaging in a comparative analysis of how domestic courts have approached and judged given issue. They have also recognized the important role that national courts could play in international law's enforcement, given their advantages of accessible jurisdiction and enforceable judgments. This is why we should teach foreign law and learn about foreign jurisprudence, having in mind that national courts frequently identify and interpret international law from the perspective of securing national legal interests[5].

[3] See A. Roberts, *Comparative International Law? The Role of National Courts In Creating and Enforcing International Law*, "International and Comparative Law Quarterly" 2011, Vol. 60, pp. 57–92.

[4] *Ibidem*, p. 73 and next.

[5] A. Roberts rightly points on the dual role of domestic courts under international law, therefore recognizing the impact that this may have on the comparative international law process; *ibidem*, *passim*.

VI

As for methodology, comparative international law is to resolve many problems such as the difficulty of finding and understanding decisions in foreign languages and foreign legal systems. And this brings me again to the conclusion of necessity of teaching and learning foreign law. In most cases, understanding foreign judicial decision is a way to attain the perspective on domestic law, the different ways in which the rules have been formulated and interpreted. Taking the international comparative law perspective, and taking foreign jurisdiction as similar to the domestic law, there is also a sense of fairness to say that similar situations should receive similar solutions across legal systems. Foreign decisions provide us also with a perspective to observe our own system and its developments. Foreign legal arguments operate in this way because of the reputation of foreign legal system and of the fact that they concern a common endeavour between the jurisdictions to resolve what is, generally, a common social problem[6].

VII

The above is especially important in the case of international comparison in the context of international law of the protection of human rights[7]. To me, as an academic and partly a practitioner, it is unthinkable that lawyers in various countries could proceed adequately without reference to foreign law and foreign jurisprudence as far as the human rights protection is concerned, because of the principle of universality and impartiality of human rights. We should teach and we should learn that in this system of law, we go from our local system to laws common to all mankind, to which our decisions and foreign decisions are contributors, and from which at the same time we are all beneficiaries.

One of the practical arguments for the question why teaching an learning foreign law that I would like to mention is that there is always something to learn from foreign law in the field of the protection of human rights. Because human rights should be considered as common to all mankind, laws regarding human rights make resources available for learning and, as jurisprudence, contain important principles and offer means for solving difficult, and at the same time vital problems. The reference to foreign human rights law might be also considered as a way of securing consistency of human rights in the sense of treating alike cases that are alike. In my opinion, that recourse to foreign law also promotes predict-

[6] See J. Bell, *The Argumentative Status of Foreign Legal Arguments*, “Utrecht Law Review” 2012, Vol. 8, No. 2, *passim*.

[7] See G. de Burca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, New York University School of Law, Working Paper No. 13–51, *passim*.

ability of human rights. By referring to foreign law, every person has access not only to doctrinal patterns of human rights law, but also to the analyses useful for striking the balances that every legal system has to confront. I share the opinion of J. Waldrom, that for the purpose of the protection of human rights, we should consider international community as a single community[8]. It is especially true when approaching the issue of implications for the Court of Justice of the European Union (CJEU) of the growing demand for it to function as a human rights adjudicator, which requires greater openness on the part of the CJEU to the use of international and comparative law methods[9].

VIII

As we well know, the CJEU role as a human rights adjudicator is actually a relatively recent one. By comparison to the European Court of Human Rights, charged with interpreting and enforcing the European Bill of Rights of 1950, the CJEU has a limited experience of adjudicating human rights issues, despite now being tasked with applying the EU Charter of Fundamental Rights into the EU legal order. Therefore, one can say that the CJEU lacks the kind of expertise and experience that other human rights courts enjoy. The use of international and comparative law in this context would provide the CJEU with relevant information on the prevailing international and regional standards of protection of particular rights, and also on the approach of other international and regional courts to addressing comparable claims. It would also allow the CJEU to demonstrate by its rulings that the Court of Justice of the European Union has engaged itself fully with the relevant arguments[10].

IX

In the context of the necessity of teaching and learning foreign law, the consistency argument and the argument of fairness should be invoked, to the effect that it is important to treat similar cases alike, particularly on issues concerning fundamental human rights, regardless of the country or jurisdiction[11]. There is

---

[8] J. Waldrom, *Treating like cases alike in the World: the theoretical bases of the demand for legal unity*, (in:) S. Muller, S. Richards (eds), *Highest Courts and Globalization*, The Hague 2010, p. 119.

[9] G. de Burca, *After the EU Charter of Fundamental Rights…*, Section II.

[10] *Ibidem*.

[11] For the status of foreign legal arguments see J. Bell, *The Argumentative Status…*, pp. 8 and next.

also another argument in favor of greater reliance by the CJEU on international and comparative law, namely that the CJEU has a growing international role, and that its rulings have implications also beyond the frontiers of the Member States and of the EU. And this is the way lawyers should learn international law of the protection of human rights and we, the academics, should teach this subject.

X

Let me refer now, in a few words, to the question why to teach international environmental law[12]. The simplest answer is because it rules the international relations in the domain of environment that we, the academics, but also politicians and practitioners call international governance of global environment[13]. Generally speaking, governance of global environment consists of diplomacy, mechanisms, and response measures aimed at steering socio-economic systems towards preventing, mitigating or adapting to the risks posed to the environment. Although the inter-state treaty-making process continues to play a key role in mitigating anthropogenic environmental change[14] it now constitutes a part of a wider system of private and public governance initiatives operating on multiple levels, starting from international, regional to national and even communities level. Its tasks are of crucial importance because it has to overcome institutional inertia that hampers the development of an effective and timely response to those changes. And that is why we should teach not only international environmental law but also foreign domestic law on the environment.

XI

One of barriers that disturb the effective development and functioning of the environmental governance is the absence of effective coercion mechanisms in global policy solutions that can effectively solve the environmental problems.

[12] For the American perspective see D. A. Wirth, *Teaching and Research in International Environmental Law*, “Harvard Environmental Law Review” 1999, Vol. 23, pp. 423 and next.

[13] On the international governance of global environment see for example P. Sands, *Principles of International Environmental Law*, 2th ed., Cambridge 2003, pp. 70–123; M. M. Kenig-Witkowska, *International Environmental Law. Selected Systemic Issues*, Warsaw 2011, pp. 76–104 (M. M. Kenig-Witkowska, *Międzynarodowe prawo środowiska. Wybrane zagadnienia systemowe*, Warszawa 2011, pp. 70–104); D. Bodansky, J. Brunee, E. Hey (eds), *The Oxford Handbook of International Environmental Law*, Oxford 2007, pp. 63–85.

[14] Comp A. Kiss, D. Shelton, *Guide to International Environmental Law*, Leiden–Boston 2007, pp. 73–89; also P. Sands, *Principles*…, pp. 123–140; D. Bodansky, J. Brunee, E. Hey (eds), *The Oxford Handbook*…, pp. 457 and next.

Solutions to environmental problems will have to be defined and implemented at various levels of global environmental governance, and global collective action is quintessential for tackling them. That brings us firstly, to the problem of the democratic legitimacy of the contemporary global environmental governance which arises from axiology of national legal approach to environmental protection and, secondly, to principles governing international environmental treaties and compliance with their provisions. To understand better these complex issues, one should realize that there have been two general tendencies in the last three decades of co-operation of the States in the field of environment. On one hand, there is a growing awareness of international community about the necessity to protect the environment on the global scale, while on the other hand, we deal with the reluctance of the States to accept legally binding obligations in this field. As a result, we have in place a variety of acts of *soft law* functioning in international legal relations, and the price the international community pays for that are unclear obligations resulting from them. The legal status of these acts becomes even more essential, when it comes to a practice of national and international courts. Therefore, the usefulness of comparative law method is very easy to prove when, for example, one takes under consideration the precautionary principle or any other principles of the 1992 Rio Declaration on sustainable development.

XII

Over the past three decades there has been a dramatic increase in awareness of environmental threats that demand international responses. As the demand for policy responses has increased, the *hard* and the *soft* international law of the environment has also rapidly developed. Teaching and learning international environmental law presents for both students and teachers challenges that demand broader knowledge of the context of public international law and, at the same time, how to tackle environmental problems (another reason why to teach international public law). Understanding the complexity of interface between public international law and domestic law is crucial in the domain of environmental law. For example, a course of international environmental law is a way to demonstrate how the law and the policy issues influence international negotiations on climate change and other global environmental problems. Furthermore, teaching international environmental law is a good opportunity to address the legal issues of international organizations, especially of the United Nations system, because international environmental policy is at the frontline of many progressive developments in the international law of the United Nations Organization.

A course on international environmental law should also require students to learn, and teachers to teach, how to integrate norms and standards of international law and domestic legal structure. Therefore, as it results from my experience, a student should be trained also in some aspects of other fields like foreign relations law, domestic environmental law, domestic administrative law and constitutional law. Foreign students, and students from outside of the European Union in particular, should not avoid to be taught also the European Union legal order. As I have already mentioned above, students should be provided at least with the basic course of the EU institutional law, which is necessary to analyze some EU instruments from in-depth textual standpoint. The EU law is complex and the EU environmental law can probably only be comprehensively taught in a course dedicated to that subject.

XIII

To conclude this part of my observations on teaching/learning of international environmental law subject, I would like to say a few words about the international environmental law as a recognized academic discipline. I would like to emphasize that international environmental law presents not only challenges in terms of teaching. It presents equal challenges on research on the scale we academics have not experienced before, because of the growing awareness of the threat to the environment. As we can observe, as a result of that, there is a chain encompassing students, teachers, academics, practitioners of environmental law, as well as business people vividly disputing the best responses to environmental threats. Therefore, research in the international environmental law has recently tended toward the structure and functioning of international environmental governance issues.

Another direction of the aforesaid discussion is the issue of interface of the international environmental law with domestic law and the intersection of such areas like trade and environment, security and environment (especially security and energy issues), or development and environment. However, some academics undermine its analytical usefulness, arguing that this kind of approach contributes very little to the development of the international environmental law as an autonomous academic discipline. In my view, much more could be done in this field if the academics rethink the concept of sustainable development as an instrument overarching legal construction that encompasses a variety of public policy goals, including environment, economic, as well as social goals.

TO TEACH OR NOT TO TEACH – WHY WE DO NEED TO TEACH FOREIGN LAW AND FOREIGN LEGAL SYSTEMS AS WELL AS COMPARATIVE LAW METHODS IN A GLOBAL WORLD?

Summary

This paper addresses the issues from the following questions perspective: why do we need to teach foreign law; why do we need to teach and learn a comparative law methods; why do we need to teach comparative international law and why to teach international environmental law. The shortest common answer is: because in our increasingly globally interconnected world, with the rise of important new developments over the last thirty years, we are related in important common legal ways. The remarks made in this paper are based on academic career and experience as a professor of law in Poland, as well as from the experience as a visiting professor at the foreign universities, including the American universities, where the author have had an opportunity to teach the EU environmental law.

UCZYĆ CZY NIE UCZYĆ? DLACZEGO POWINNIŚMY UCZYĆ PRAWA OBCEGO I STOSOWAĆ METODOLOGIĘ PORÓWNAWCZĄ W NAUCZANIU PRAWA W GLOBALNYM ŚWIECIE?

Streszczenie

Artykuł odnosi się do zagadnień zawartych w tytule artykułu z perspektywy następujących pytań: dlaczego powinniśmy uczyć obcego prawa; dlaczego powinniśmy uczyć oraz sami uczyć się metod prawa porównawczego; dlaczego powinniśmy uczyć międzynarodowego prawa porównawczego i w końcu – dlaczego powinniśmy uczyć międzynarodowego prawa środowiska. Najkrótsza odpowiedź brzmi: ze względu na postępujące procesy globalizacji, w tym globalizacji przestrzeni prawnej i globalizacji obrotu prawnego. Uwagi zawarte w artykule są oparte na doświadczeniach wyniesionych z wieloletniej kariery akademickiej Autorki jako profesora prawa w Polsce oraz na zagranicznych uczelniach, również w Stanach Zjednoczonych, gdzie wykładała prawo środowiska Unii Europejskiej.

BIBLIOGRAPHY

Bell J., *The Argumentative Status of Foreign Legal Arguments*, “Utrecht Law Review” 2012, Vol. 8, No. 2

Bodansky D., Brunee J., Hey E. (eds), *The Oxford Handbook of International Environmental Law*, Oxford 2007

Burca G. de, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, New York University School of Law, Working Paper No. 13–51

Eberle E., *The Method and Role of Comparative Law*, “Washington University Global Studies Law Review” 2009, Vol. 8, No. 3

Kenig-Witkowska M. M., *International Environmental Law. Selected Systemic Issues*, Warsaw 2011

Kiss A., Shelton D., *Guide to International Environmental Law*, Leiden–Boston 2007

Roberts A., *Comparative International Law? The Role of National Courts In Creating and Enforcing International Law*, “International and Comparative Law Quarterly” 2011, Vol. 60

Sands P., *Principles of International Environmental Law*, 2th ed., Cambridge 2003

Tokarczyk R. A., *Legal Comparative*, Warsaw 2008

Waldrom J., *Treating like cases alike in the World: the theoretical bases of the demand for legal unity*, (in:) S. Muller, S. Richards (eds), *Highest Courts and Globalization*, The Hague 2010

Wirth D., *Teaching and Research in International Environmental Law*, “Harvard Environmental Law Review” 1999, Vol. 23

KEYWORDS

teaching foreign law, comparative law methods, comparative international law, international environmental law

SŁOWA KLUCZOWE

nauka prawa obcego, metody prawnoporównawcze, porównawcze prawo międzynarodowe, międzynarodowe prawo środowiska