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Essay: Shaping the Content of a Basic Course on Latin American Legal Systems

Alejandro M. Garro

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ESSAY

SHAPING THE CONTENT OF A BASIC COURSE ON LATIN AMERICAN LEGAL SYSTEMS

ALEJANDRO M. GARRO*

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This Article is dedicated to the memory of Henry P. de Vries, under whose guidance the author learned so much about Anglo-American perspectives on Latin American legal institutions. Professor de Vries was a leading comparatist who developed a pioneering program in Latin American Law and Society at Columbia University.

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I. INTRODUCTION

Every instructor of a course in comparative law or foreign legal systems has to make a number of choices about the subject. This is especially true in a course or seminar on Latin American law, because the instructor should emphasize the legal diversity of each country to avoid overgeneralizing with respect to such a vast area. In addition to the problem posed by the broad geographical scope of the Americas, a teacher must choose among a variety of legal problems and should concentrate on those topics of special interest to Latin America. Many teachers also have topics coinciding with their research interests which they wish to include in a course of this nature. Much selection must be done to cover with minimum depth, in a two or three hour course, legal problems that are concrete enough to lend themselves to class discussions.

My own choice of topics is reflected in the material covered for a course on Latin American Law and Society and a seminar on Latin American Legal Transactions.¹ Rather than my own concept of what the students *should* learn in a general or basic course in Latin American law, these choices reflect my own feelings about what the students who enroll in my course and seminar *want* to learn. As to what the students want to learn, I am guided by a questionnaire that students are asked to answer at the beginning of the semester, as well as assumptions based on my teaching experience. This survey of students' interests helps to identify the geographical and topical preferences of those enrolled in the course, and ensures that their particular interests will be adequately represented.² Another survey of the teachers' interests in Latin American legal systems helps identify the different approaches to the

1. The syllabi and summary of topics of both courses are reproduced in the Appendix following this article.

2. The questionnaire asks the following questions: (1) Why do you want to take this course; (2) In which Latin American legal system are you particularly interested; and (3) Which legal topics would you like to be covered in class discussion and in the reading materials?

teaching of Latin American law in U.S. law schools.³

The content of a basic course or seminar in Latin American legal systems depends on various elements, one of which is the content of other courses dealing with foreign legal systems offered by the law school. Whether there should be only one course on comparative law focusing on many civil law systems, or two or more comparative law courses separately dealing with Western Europe, Latin America, or socialist legal systems, is a question that each law school will decide in accordance with its available manpower and general curricular objectives. My choice of what to include or exclude from a basic course on Latin American law is based on the assumption that the course I teach is offered as one of a group of related courses on comparative law. Therefore, in shaping the contents of a basic course in Latin American law, I first try to ensure that the chosen problems do not overlap with those dealt with in parallel courses such as Comparative Law, Transnational Litigation, or International Business Transactions.

The risk of overlapping is minimal, however, due to two different but related reasons. First, most of the courses and seminars dealing with foreign legal institutions concentrate, by and large, on Western European legal systems (especially France and Germany), and do not cover Latin America. Second, most students choose to take only one course out of the many courses covering different aspects of foreign legal systems. Since most students lack a background in comparative law, it is necessary to discuss the main features of the civil law tradition, as opposed to the common law tradition, in a basic course in Latin American law.

The inclusion of a particular Latin American jurisdiction or institution in a basic course also is influenced by the educational background and personal interests of the instructor and the wealth of library materials on the particular country. This is related to the degree of legal activity reached in that jurisdiction, as manifested in reported cases, legal treatises and periodicals, and the availability of primary and secondary legal sources in English. Few teachers of introductory courses on comparative law or foreign legal systems are able to rely on the students' ability to use original source

3. This survey was based on a questionnaire distributed to the participants in a two-day conference on Latin America and Law School Curricula, held at the Faculty Center of the University of California at Los Angeles on November 13-14, 1986. For a discussion of the findings of the survey, see Garro, *The Teaching of Latin American Legal Systems in U.S. Law Schools*, 38 J. LEGAL EDUC. 371 (1988).

materials. Accordingly, the availability of Latin American statutes, cases, and materials translated into English is crucial for the success of the course.

With this as a background, I turn now to a discussion of the different considerations that must be weighed in shaping the content of a basic course or seminar in Latin American law. Because the study of the legal systems of Latin America presents a special problem of justification, I shall begin by discussing why the study of Latin American law is a worthwhile focus for study from a North American perspective.

II. WHY TEACH LATIN AMERICAN LAW?

For a graduate from a Latin American law school interested in the legal system of the United States, the comparative study of Latin and Anglo-American legal systems is a rewarding task in itself. However, most law students in the United States probably would not engage in the study of Latin American legal systems simply to satisfy their intellectual curiosity. It is reasonable to expect law students in the United States, like other professional students, to seek knowledge not for its own sake but for a specific purpose, one which coincides with the entrance requirements of the profession they wish to join. Although a course in Latin American law does not appear to be directly helpful in passing a bar exam, many students may find it useful to study Latin American legal systems in order to draw comparisons with their own system. This facilitates a better understanding of the fundamentals of American law by examining how another legal system deals with similar issues. Students interested in international business transactions may find that the study of the legal systems of Latin America contributes to the body of knowledge and skills they will put to actual use in their later careers as attorneys, legislators, government officials, or business advisers.

Seen from this pragmatic point of view, North American commercial interests and investments in Latin America, as well as the region's political importance to the United States, warrant the inclusion of an elective course on Latin American legal systems. Whether it is more profitable to study the Brazilian or Mexican legal system, and whether the legal problems should be chosen from the field of constitutional law, contracts, or commercial transactions, are questions that call for varied answers. The point here

is that, assuming a wise choice is made as to representative countries and topics, a course on Latin American legal institutions can offer much practical help to the student who seeks to arm himself with a deeper understanding of his own legal system or to handle cases and negotiations in Latin America.

In stark contrast to the many programs of study on Western European (principally German and French), Soviet, Japanese, or Chinese legal systems available at several U.S. law schools, few universities in the United States offer a systematic study of the laws of any Latin American country. There are many reasons for this lack of interest in Latin American law, but there are two particular problems that should be addressed. First, most law schools do not make room in the curricula for more than one course in foreign legal systems and comparative law. Since most of Latin American private law derives from French law and most courses on foreign law focus on the French legal system, arguably there is little point in dealing with Latin America in a basic course on comparative law. The second problem, which, from the point of view of law and development may be regarded as a pedagogical advantage, is that the level of disparity between the written law and the law in action in Latin America is so great that its legal institutions are a worthwhile focus for study by American economists, anthropologists, and political scientists, but not by legal scholars. The general curricular objectives of the law school, however, will determine whether Latin American law has a place in the law school curriculum, either as an integral part of a more general course on civil law systems or as a separate course dealing with problems of law and development.

III. LATIN AMERICAN LAW AS AN INTEGRAL PART OF COMPARATIVE LAW

As stated before, it is not difficult to understand why Latin American law has been, and generally is, excluded as a focus of study in a general course on comparative law. Much of the Latin American private law derives from the civil and commercial law of France, Spain, and to a lesser extent, Germany and Italy. Therefore, for a basic course on comparative law, one might study the civil law of France rather than its derivative Latin American version.⁴ Moreover, French and German source materials tend to be

4. Most of the pioneer comparative legal scholarship in the United States was produced

richer than Argentine, Brazilian, or Chilean legal materials, which are themselves richer than many other Latin American countries. Primary as well as secondary source materials on Western European legal systems are more readily available in English than are Latin American sources. Finally, the role played by the formal legal system in the United States is more similar to that of Western Europe than to Latin America, thus offering more opportunities for meaningful legal comparisons.

There is ample justification, therefore, for concentration on jurisdictions like France and Germany rather than Mexico and Venezuela in a general course on comparative law. But I believe that such a course would be richer and more interesting if the instructor were to include some Latin American variations on the theme of civil law systems. This approach is especially justified when the law school curriculum offers only one course in comparative law. One teaches a comparative law course aimed not only at comparing Latin American codes and constitutions with European and North American models, but also with each other. However, while accepting that the inclusion of Latin America will add interest and flavor to the study of civil law systems, I wonder whether the few semester hours available to discuss the French and German legal systems leave any room for a meaningful examination of more exotic variations.

Some law schools are willing and able to offer courses in foreign law in addition to a basic course on comparative law. Moreover, one should not be surprised to find that some law students are interested in learning about Latin American legal institutions rather than their Western European counterparts, and many of those students are not in a position to take more than one course in comparative law. This is the situation I faced in deciding what topics to include in a course entitled, "Latin American Law and Society" at Columbia University. Because most students enrolled in this course lacked any background in civil law systems, I concentrate during the first half of the semester on some aspects of the legal process in civil law systems (e.g., historical background of the civil law tradition, system and organization of the codes, formal structure, legal education, legal professions, the judicial process). After that I compare some Latin American public and pri-

by German jurists whose work focused on European legal systems. Consequently, most of the existing legal scholarship on the subject is related to Western European legal systems, rather than Latin American.

vate institutions with North American models. Thus, this basic course in Latin American legal systems attempts to introduce the law student to fundamental concepts of the civil law, and then examines the administration of criminal justice, the system of judicial review, and the functioning of procedural remedies for the protection of individual rights. The reason for emphasis on those topics instead of others is a point that will be addressed later.

IV. LATIN AMERICAN LAW AS A SEPARATE FIELD OF STUDY

The traditional disregard for written rules of law displayed by many Latin American countries is partly responsible for the lack of recognition of Latin American law as a respectable subject of academic study in U.S. law schools. It is well known that in the United States, in contrast with Latin America, the trend of legal research, study, and scholarship has been toward a critical policy-oriented analysis of legal rules. Accordingly, Latin American legal studies in the United States naturally tend to emphasize the social-economic-political context within which rules of law operate. Indeed, the best available American legal scholarship on Latin American legal institutions has been weighted toward what a Latin American lawyer would label as empirical studies rather than a straight juridical (i.e., technical and conceptual) analysis of legal norms.⁵

The viewpoint of Anglo-American legal scholars on Latin American legal problems generally does not make much sense to the typical Latin American jurist. Few lawyers and students of constitutional law in Latin America would have thought of measuring behavioral and structural determinants of judicial review in order to assess whether the courts effectively use their authority to control the constitutionality of statutes, administrative acts and regulations, and judicial decisions.⁶ Few Brazilian legal scholars would care to undertake studies of how laws and regulations are

5. For a description of the overwhelmingly formalistic character of Latin American legal education and scholarship, see K. KARST & K. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA*, 66-69 (1975); Kozolchik, *Toward a Theory on Law in Economic Development: The Costa Rican USAID-ROCAF Law Reform Project*, in *1971 LAW & THE SOCIAL ORDER* 681, 751-54.

6. For an excellent comparative study on the effectiveness of judicial review in Latin America, see Clark, *Judicial Protection of the Constitution in Latin America*, 2 *HASTINGS CONST. L.Q.* 405 (1975).

regularly twisted to the demands of expediency.⁷ Certainly, very few Venezuelan legal scholars would consider studying property law through an examination of the practical application of *in rem* rights in the great urban slums of Caracas.⁸ Scholarship of this kind may be of high caliber and useful, but it is not representative of Latin American legal thinking. To most Latin Americans, the focus of those research studies appears to fall outside the domain of "legal science." Alternatively, the Latin American style of legal analysis, with its emphasis on logical deductions from the codes or the writings of prominent legal scholars, seems too barren to provoke interest in American law students.

From an Anglo-American perspective then, it does not seem profitable to study Latin American law as perceived and studied by Latin Americans. Not surprisingly, books written in English about the law of Latin American countries are remarkably scarce; the number of interested full-time instructors on U.S. law school faculties also is small; and law student interest in the subject is not significant. In university departments other than law schools, however, hundreds of historians, political scientists, economists, sociologists, anthropologists, and "Latinamericanists" in general undertake research and publish material about the social and economic problems of the region. It seems that the political science, economics, and sociology scholars are better suited and much more willing to undertake studies and research on Latin American legal institutions. The dominant perception is that Latin American countries, generally classed as underdeveloped and backward, lack a pattern of social organization sufficiently cohesive to permit a minimum basis for comparison of the role of legal institutions as an integral part of a culture.

It is true that the study of Latin American legal institutions only makes sense within their social contexts. However, if one of the basic purposes of a course in Latin American law is to understand the role of law in Latin America, it is imperative that American law students be exposed to the way in which a Latin American

7. For an entertaining discussion of the different ways to get around the formal legal rules and a cost-benefit analysis of paralegal institutions in Brazil, see Rosenn, *Brazil's Legal Culture: The Jeito Revisited*, 1 FLA. J. INT'L L. 1 (1984); Rosenn, *The Jeito: Brazil's Institutional Bypass of the Formal Legal System and its Developmental Implications*, 19 AM. J. COMP. L. 514 (1971).

8. For a research study on the operation of patterns of owner's rights and family obligations in some urban squatter settlements surrounding the city of Caracas, see K. KARST & K. ROSENN, *supra* note 5 at 574-710.

lawyer and scholar would focus on a legal problem, even if such an approach is regarded as barren, too abstract, or extremely conceptual from an Anglo-American perspective. This way of thinking is part of the Latin American lawyer's intellectual conditioning. The American student must be able to work within the framework of the terminology and concepts of his Latin American colleague in order to have the ability to communicate with him. This is what a course in Latin American law, offered within a program for the professional training of lawyers, should be. Furthermore, the notion that a legal order should play a prominent role in shaping the conduct of people and the functioning of a political system also is part of the intellectual conditioning of Latin American lawyers. Law, in the Western sense, has been and continues to be an integral part of Latin American society. Therefore, it should be possible to find the basis for meaningful comparison of the cultural values found in the Latin American and United States legal systems.

Teaching Latin American law poses a number of problems concerning the goals for the course, the legal systems to be emphasized, the topics to be covered in class, the materials to use for reading assignments, and the methods of instruction to use. These problems shall now be examined.

V. OBJECTIVES OF THE COURSE

The objectives of the course should largely depend on the motivations and needs of the students. At whom should the course be aimed: the future international practitioner who has a cultural interest in Latin America and would like to get acquainted with the civil law systems throughout Latin America; the future teacher of comparative law; the public service career man who is interested in sociology and developmental reform; or the general practitioner who wants cultural enrichment? If the motivations and professional needs of students are homogenous and easily detectable, then the content of the course or seminar should be developed in order to suit those needs. Otherwise, the range of topics to be covered in class should try to strike a balance between these needs and motivations.

Thus, if the course is aimed at a student whose future clients or employers will be American businesses with investments in Latin America, then a student's acquaintance with Latin American legal systems will become an attribute to his future practice. Un-

less this student already has some background in civil law systems, a cursory view of the Latin American legal systems will not suffice to provide him with a solid foundation for his legal practice. This type of need requires selection of one particular Latin American country, the use of original sources for class discussion and research, and a well chosen set of legal problems addressing the most immediate concerns in his future professional practice.⁹

If the course is addressed to a general practitioner who wants some information on how to do business with Latin America, then the range of topics should focus generally on how to qualify to do business abroad, taxes, labor regulations, and laws on foreign investments and technology transfers.¹⁰ If the course is aimed at students of political science or international affairs, then the choice of topics should fall upon subjects of constitutional law, the role of the executive and legislative branches of government, de facto governments, and judicial review and protection from governmental action. A course of this type could provide general information and insights concerning Latin American constitutional frameworks from which students could proceed to specialized studies. If the student's practical motivations for taking a course on Latin American law are found in a public service career, then it would be important to evaluate the legal institutions according to their responsiveness to the development goals of a particular Latin American country.¹¹

There are many more subjects that take a special place in a course on Latin American law. The choice of country and subject matter is easier to make if the students come with a common educational background and are motivated by homogeneous profes-

9. For most practitioners this kind of intensive training is not required, unless a substantial part of the student's future counseling practice will be connected closely with one Latin American country in particular. This approach may be justified, however, in law schools located in southern states with close ties to Mexico. See Kozolchyk, *Comparative Legal Study: Another Approach*, 14 J. LEGAL EDUC. 367, 371 (1962) (referring to the need to adopt a vertical method of teaching comparative law with an emphasis on Mexican law, an abridged and revised version of a problem-case method as used in regular law classes throughout this country).

10. This kind of knowledge does not require much immersion into the Latin American legal systems, but rather an acquaintance with the business and administrative practices of the government agencies in charge of regulating the economy of the country.

11. Professor Karst has outlined and commented upon some research topics and problems related to the operation of law in Latin American society. See Karst, *The Study of Latin American Law and Legal Institutions*, in SOCIAL SCIENCE RESEARCH ON LATIN AMERICA 290, 296 (Wagley, ed. 1964).

sional or cultural interests. But what type of basic course on Latin American law should be devised when, as is the case with most law schools, such a course is aimed at students of international affairs, political science, international business, economics, as well as candidates for law degrees with and without backgrounds in civil law systems? One looks around the classroom the first day of classes in the semester and sees students with the most varied of interests; all of them have some claim on the professor's attention. Most students who take the course in Latin American Law and Society at Columbia University Law School lack a general background in the civil law tradition. Consequently, a primary goal of this course is an overview of the sources of law, the judicial process, legal education, and the organization of the legal professions in Latin America.

Given the number of jurisdictions and the various problems that may be addressed within each one of the many legal disciplines, one realizes that the course must be a "selected problems" course. Even accepting that many interesting topics must be discarded because of time limitations, the first question that must be addressed is whether to include topics within the area of public law (constitutional, administrative, criminal law and procedure); civil and commercial law (structure of the civil and commercial codes, distinctions between the two codes, contracts, commercial transactions), or both.

VI. PUBLIC OR PRIVATE LAW?

Although the traditional distinction between public and private law has lost much of its purpose, from the point of view of overall organization of a basic course on Latin American legal systems it makes sense to face the choice of including either a selection of public law or of private law topics. The first semester I taught the course I included topics as different as constitutional protection against arbitrary governmental action and transfer of technology; the experience was not rewarding. There must be some connection between the topics, other than the fact that they belong to one legal system, to give a course or seminar a cohesive approach.

For purposes of introducing a student to civil law systems, it is appropriate to review the traditional approaches of civil law systems to liability in contracts and torts. However, my choices in this

instance are guided by two important factors: (1) there is a basic course on comparative law, regularly taught at Columbia, focusing on the French and German law of contractual and extra-contractual liability, and (2) many students who take the basic course in Latin American law are graduate students from the School of International Affairs, who are mostly interested in the legal framework of the political system (i.e., constitutional organization of the state) and the protection of human rights. Accordingly, I have decided to concentrate on areas such as the structure of criminal proceedings, judicial control of constitutionality, and procedural remedies for the protection of individual rights.

The inclusion of these public law topics in a basic course offered during the fall semester prompted me to offer a seminar during the spring semester dealing with very different legal problems. The seminar on Latin American Commercial Transactions focuses on the system and organization of the civil and commercial codes and on some of the basic legal problems that American lawyers may encounter in inter-American litigation, including the basic characteristics of civil and commercial procedure, conflict rules in Latin America, and the inter-American framework of judicial cooperation.

The advantage of dealing with different topics is the coordination of law school offerings in Latin American law with various student interests. Generally, students who are interested in human rights and constitutional protection against arbitrary action are not very enthusiastic about learning commercial transactions. Conversely, the student who wishes to spend his time in class discussing topics such as how to repatriate profits from foreign investments is rarely interested in human rights. This is not always so, but it is a recurring pattern which warrants a separate course or seminar in order to satisfy very different interests.

Even if one is firmly persuaded that the students should be offered a chance to choose between subjects as diverse as constitutional law and contracts, many other choices remain. Should the course compare the constitutional systems or the law of contracts of a number of Latin American countries, or should the instructor select one jurisdiction and concentrate on it?

VII. GEOGRAPHICAL SCOPE

Latin America is generally regarded by North American ob-

servers as a single cultural and legal entity. Indeed, the contrast between Latin-American and Anglo-American legal institutions is pedagogically useful, because both groups of legal systems derive from diverse historical and cultural backgrounds. Yet despite the existence of a common Latin American legal heritage, there is no body of laws as such that properly can be identified as Latin American law. Moreover, just as legal regions such as Western Europe and Africa can be understood adequately by closer analysis of their component parts, it is necessary to examine the distinctive and individual features of Latin American legal systems in order to appraise their diversity.

However, the fragmentation of Latin American legal studies into more than twenty separate units is neither manageable nor pedagogically sound. Whatever is gained in comprehensive representation of Latin American variations to a legal issue is more than lost in quality and depth. Moreover, the student cannot hope to learn much about the substantive law of several countries at once. Therefore, the instructor must attempt to strike a balance between unwarranted generalizations and indigestible masses of detail pertaining to each particular country. If this balance is done well, the student can get an understanding of how and why Latin American legal systems differ in structure and content, and in their attainment of social goals. If this is not well done, the student may experience an attack of mental indigestion trying to remember whether it is Peru or Mexico that has a concentrated system of judicial review, or whether it is Argentina or Brazil that allows the recovery of moral damages in strict liability theory.

Limiting the countries to one, two, or at the most three, avoids this problem of confusion. I prefer to concentrate on countries like Argentina, Brazil, and Mexico, with occasional and tangential references to other Latin American legal systems. In reality, if a student later turns to a client with problems in a Latin American country other than the one focused on during the course, he will not attempt to solve the problem alone. He will know, if he has absorbed anything at all from the course, that he does not know whether the law of the Dominican Republic on his point is exactly the same as the law of Honduras. The student will find, however, that the general structure of the law of the Dominican Republic is familiar to him; he will know where to look to confirm similarities or discover differences; and he will be able to talk intelligently with counsel from the Dominican Republic. Yet, what if the problem

the student runs across in his professional practice is one he has never heard of because of my choice of topics? This leads to the next issue, that is, the scope and breadth of topics to be covered.

VIII. DEPTH OF COVERAGE

Should a course try to cover many legal disciplines and problems, a process which requires moving rapidly and therefore being superficial, or should the instructor select one or more specific areas and go into them with the same sort of depth of approach he would give to the same problem in a required core course in American law? This is a hard choice, but one that needs to be made, inasmuch as the decision to devote serious attention to one problem implies leaving out other topics entirely.

In order to obtain coherence of treatment, my choice has been to select a few topics from not more than two or three Latin American jurisdictions, while I try to ensure that the chosen topics are somewhat inter-related. The subjects of criminal procedure, judicial review, and procedural remedies for the protection of constitutional rights provide an illustration of the range of problems dealt with in the course on Latin American Law and Society. The administration of criminal justice in any Latin American country is closely connected with the way in which the legal system copes with the violations of basic constitutional rights of common criminals and of political opponents as well. The mechanism of judicial review and the procedural aspects of constitutional litigation also have a close bearing on the protection of individual rights. Covering all those topics during one semester gives the course a sense of continuity and coherence that is impossible to obtain if one discusses judicial review in one class and shifts to forms of business organizations in the next one.

During the second semester, however, the range of topics is wider. In the seminar on Latin American Legal Transactions I try to explore the basic framework of civil and commercial transactions. This doctrinal foundation allows me to deal later with legal problems that are likely to come up in the private or governmental work of lawyers practicing in the United States. The first part of the seminar examines the structure and organization of the codes and the interdependence and distinctions between civil and commercial transactions. To illustrate the interaction between these two branches of the law, a brief look at the formation of contracts,

some specific contracts (sale of land, lease, and agency), secured transactions, torts, and civil procedure is necessary. The second part of the seminar focuses on some problems American lawyers may encounter in transnational litigation with Latin American parties, including service of process, taking evidence, and the collection of money judgments in Latin America, along with the inter-American legal framework for the enforcement of judgments and arbitral awards.

The broad scope of such an overview leaves little room for in-depth analysis. Thus, a wide range of topics is defensible on two grounds. First, a large number of topics offers a better opportunity for those students who actively participate in the seminar to concentrate and undertake further research on the particular subject of their choice. If the choice is too limited, there is a greater risk that the areas chosen for emphasis might be areas a student never will run across in practice, and the problems he might actually confront could be things about which, because of such choice limitation, he had never heard. The second reason for choosing this wide range of topics has to do with the practical purpose for which the course is taught.

IX. PRACTICAL PURPOSE OF THE COURSE

The usual law school course aims to teach the law student how to reason and argue before a court the wide variety of legal problems arising from the diverse sets of facts a client may bring to him. This is not the purpose of a basic course in Latin American law. It would be foolhardy to try to cover in thirty hours the better part of what an Argentine or Mexican lawyer learns in five years of law school, and in addition, to try to convey the societal and cultural grounding that make the legal institutions particularly Latin American. The most the course may try to instill in the student is the ability to communicate with Latin American counsel, to determine whether the Latin American lawyer's advice makes sense, and to take appropriate action if it does not. In other words, a course or seminar in Latin American law is not geared to teach an American law student to think like a Brazilian or Venezuelan lawyer, but rather to teach him to know how a good Latin American lawyer thinks, and to recognize good or bad thinking when he sees it.

Viewed in this light, the broad sampling of topics seems a

good choice, even at the risk of being charged with superficial coverage. Even with a wide range of topics, there needs to be a lot of selection and elimination. As stated at the outset, such a selection is strongly influenced by the teaching materials that are available. Although books and articles written in English about the law in Latin America are very few, and consequently the choices left to the instructor very limited, there remains something to be said with regard to the materials to be assigned for readings before class.

X. WORKING MATERIALS

Ideally, a student should be assigned to read code and statutory provisions, commentaries, and, if available, some significant recent cases. If the assigned topics are related to the protection of constitutional rights, it will be important to assign not only the pertinent constitutional provisions and procedural legislation but also some significant cases. If the topics are related to the civil and commercial codes, the code and ancillary provisions found in special statutes should be read in conjunction with legal commentaries, in order to convey the importance of scholarly opinions as a persuasive source of law and the style of the legal literature in Latin America. As soon as the student is familiar with one particular institution found in the civil or the commercial code, a problem related to the covered materials should be assigned. Students then could familiarize themselves with the style of the codes and statutes, court decisions and doctrine, and learn how a Latin American lawyer handles legal problems. Many American lawyers, accustomed to a problem-solving approach to legal issues are likely to come up with questions to which Latin American lawyers pay very little attention. This problem leads one to address the method of instruction or classroom techniques that should be used in teaching a basic course on Latin American law.

XI. METHOD OF INSTRUCTION

Throughout Latin America the prevailing method of law instruction is the lecture system traditionally followed in Continental Europe. Although more classroom discussion between professor and students has been recommended for a long time, and many instructors actively encourage student participation in class, it is highly unlikely that the case method of instruction will be insti-

tuted in Latin America as a prevailing classroom tool. Arguably, straight lecturing is more suitable for the teaching of a foreign legal system, especially when the aim of the course is not so much to train American law students in Latin American legal thought processes, but rather to provide a sound introduction and understanding of how foreign legal systems operate. Arguably the case method may prove ineffectual when used in teaching a legal system where case law is merely an indirect, supplementary source of law. Moreover, resort to the case method in teaching Latin American legal systems, may bring into play common law notions and techniques, thus denaturalizing the very essence and structure of those civil law systems.¹²

Despite those arguments, my choice of instruction method is the case method coupled with some straight lecture against the background of code provisions, statutes, and the writings of legal scholars. My reasons for this are as follows:

(a) The teacher of Latin American law in the United States, to a much greater degree than his colleagues in Latin America, deals with students more accustomed to an active participation in classroom discussion. By the time the student takes up a course in Latin American law, which is always an upperclass or graduate course, his study habits are apt to be established. There are strong pedagogical reasons for using the method of instruction in which the students are generally trained.

(b) Since the Latin American legal systems differ greatly from the system with which students are most familiar, it seems particularly important from an educational point of view not to increase the beginner's discomfort by introducing an unfamiliar method of teaching. Although law students have been exposed to the lecture method while undergraduates, it is convenient to maintain a pedagogical format common to other law school courses.

(c) Use of cases gives students the chance to observe and develop a feel for the differences in perspective and flavor between the styles of Latin American and Anglo-American judicial decisions and among those of different Latin American countries. The narrative facts of a case allow students to grasp the problems of real people, thus enhancing their motivation for taking a close look at the legal arguments.

12. Batiza, *The Teaching of Latin-American Law in the United States*, 4 INTER-AM. L. REV. 416, 418 (1962) (Tul. U.).

(d) Reading cases allows students to follow the procedural steps of litigation, discover the avenues that are open to an aggrieved party to seek justice, and find out how the judicial machinery works in practice.

(e) The case method also familiarizes students with the legal issues involved by examining the arguments advanced by the parties. The decision of a court provides an opportunity to watch the judicial process at work. Did the answer come right out of the code? If not, what method of interpretation did the court follow?

(f) Reading and discussing cases also gives an instructor the chance to discuss unfamiliar terms and institutions. Why is the notary so important in a real estate transaction? Why is the public ministry required to give an advisory opinion and on what issues? Much rewarding classroom time is spent discussing unfamiliar terms found in judicial decisions.¹³

The study of Latin American legal systems involves comparisons, usually with a student's own legal system. The instructor, therefore, should attempt to make a connection between a particular Latin American legal institution and what a student has learned about this institution in his domestic curriculum. Without such a connecting link, which ties the legal problem in a foreign legal system to the student's legal experience, the presentation of a particular legal institution in Latin America will strike the student as too abstract. For this reason, of the many qualities which should be required of a comparative law teacher, it is particularly important to master the legal system in which students have been raised.¹⁴

The instructor has at least as much to learn about comparative law as do the students; as a result, both gratification and encouragement are derived from the learning experience of teaching Latin American law in a non-Latin American institution. I look forward to increasing contact with the general body of lawyers and law students in the United States and Latin America to develop greater awareness of their interests and working habits.

13. The unavoidable drawback is that the discussion of cases is time consuming. Even with the benefit of an excellent translation there is much explanation needed on the legal terminology, procedural peculiarities and cultural patterns explaining the factual setting of the case. It is up to the instructor to make wise use of the available time, a problem which is also present if the lecture method were to be used.

14. See Schlesinger, *Teaching Comparative Law: The Reaction of the Customer*, 3 AM. J. COMP. L. 492, 501 (1954).

APPENDIX

Syllabus No. 1

LATIN AMERICAN LAW AND SOCIETY

The purpose of the course is to serve as an introduction to the basic features of the Latin American legal systems. The main focus is the study of judicial decisions, statutes, and the analysis of legal problems in light of the cultural components of Latin American society. The first part traces the historical evolution of Latin American legal institutions, followed by a study of the constitutional organization of the Latin American countries. The second part explores the legal culture, formal structure of the legal systems and the role of the judiciary and legal professions. The third part covers the judicial process, judicial review systems, and procedural remedies for the protection of individual rights. Emphasis will be placed on the operation of the legal system under the stress of political instability and *de facto* governments.

Summary of the Topics

- I. Historical Development and Constitutional Organization
Formative Factors - Continuity of the Civil Law Tradition in Latin America - Colonial Legislation and Administration - Political Independence - Constitutionalism - Constitutional Organization - *De Facto* Governments
- II. *Formal Structure*
Legal Education - Legal Culture - The Legal Professions - The Judiciary
- III. The Judicial Process
Sources of Law - "Stare Decisis" and *Jurisprudencia* - Interpretation and Application of the Law
- IV. Procedure
Criminal Procedure - Combined Criminal-Civil Proceedings
- V. Judicial Review
Judicial Control of Constitutionality - Judicial Review of Legislation and Executive Action - Judicial Review of International Treaties - Procedural Restrictions

- VI. Procedural Remedies for the Protection of Individual Rights
Habeas Corpus in Latin America - Mexican Amparo -
 Brazilian *Mandado de Segurança* - Argentine Amparo
- VII. Judicial Review in a Revolutionary *Ambiente*
 Judicial Review in Argentina Under a State of Siege -
 Judicial Review in Brazil Under Institutional Acts - Ju-
 dicial Review in Chile Under a State of Emergency -
 Military Jurisdiction and Due Process - Effectiveness of
 Judicial Review in Latin America

Syllabus No. 2

LATIN AMERICAN LEGAL TRANSACTIONS

This seminar gives students an opportunity to explore the basic framework of civil and commercial transactions in some representative jurisdictions of Latin America. The first part of the seminar examines the system and organization of the civil and commercial codes, and the interdependence and distinctions between civil and commercial transactions. This introductory part establishes the conceptual foundation for the second part of the seminar, focusing on some specific issues of the law of contracts, secured transactions, creditors' rights, and torts. The third part focuses on some basic problems that American lawyers may encounter in inter-American litigation. Among the topics included are some characteristics of civil procedure in Latin America, service of process, taking of evidence, collection of money judgments, and commercial arbitration. Following an examination of the conflict rules built into the civil codes and inter-American conventions, the seminar concludes with a look at judicial cooperation in international practice.

Summary of the Topics

I.

1. Historical and Institutional Background of the Latin American Legal Systems.
 The civil law tradition in Spain, Portugal, and the New World Colonies
2. System and Organization of the Codes.
 Coverage and structure of the civil codes - Coverage and Structure of the commercial codes - Civil and com-

mercial law as separate branches of private law - Historical reasons for the dichotomy - Sources of commercial law - Commercial law and economic development in Latin America

3. Interdependence Between the Civil Code and the Commercial Code.

The Commercial Code as *lex specialis* - Divergencies between the civil code and the commercial code - Which of the two codes applies? - Distinctions between commercial and non-commercial transactions in Argentine law - The mercantile act in Mexican law

II.

4. Some Aspects of the Formation of Contracts.

The requirement of "consent" - Vices of consent in Argentine law - "Error," "fraud," and "lesion" as vices of consent in the formation of contracts under Argentine and Mexican law

5. A Brief Look at Some Specific Contracts.

Contract for the sale of land: preliminary agreement to sell, the public deed, transfer of ownership and registration - The contract of lease in Mexican law - The "contract" of agency (*mandato*) and powers of attorney in Latin America

6. Secured Transactions and Creditors' Rights.

Guaranty - "Aval" - Pledge - Ranking of Security Interests - Creditors' avoidance efforts: revocatory action and action of declaration of simulation

7. A Brief Look at Torts.

General view of delictual liability in Latin America - The fault principle and strict liability - Strict liability in Mexican law: Elements of the cause of action and measure of recovery - Punitive damages and "moral damages" - Development of products liability in Argentina

III.

8. A Brief Look at Civil Procedure.

Overview of civil procedure in Latin America - Jurisdiction and competency in Mexican law - Competency *in*

rem and *in personam* - Subject matter competency and federal jurisdiction in Mexico - The complaint and its sequel: service of process and the taking of evidence - Importance of documentary evidence and credibility of witnesses in Latin America - The essentials of appellate review and "cassation" - The collection process: executive proceedings (*juicio ejecutivo*) in Mexico and Brazil

9. Inflation and the Law.

Contractual adaptations to inflation: nominalism and valorism - Indexation and foreign currency clauses - Judicial efforts to mitigate inflation: the theory of *imprevisión* in Argentina and the doctrine of *lesión* in Chilean law

10. A Glimpse at Conflicts of Laws.

Conflict rules built into a code system: form and structure - Inter-American agreements concerning private international law (Bustamante Code, Montevideo treaties, O.A.S. Specialized Conferences on Private International Law)

IV.

11. Inter-American Judicial Cooperation.

Services of documents by letters rogatory - Service in foreign and international litigation - Inter-American Convention on Letters Rogatory - Obtaining evidence in Latin American countries - Inter-American Convention on the Taking of Evidence Abroad - Enforcement of foreign judgments

12. Commercial Arbitration.

Arbitration law and practice in Latin America - Enforcement of arbitration agreements - Arbitral claims brought before local courts - Enforcement of foreign arbitral awards - Latin America and multilateral conventions on international commercial arbitration