

CICERO'S BELOVED REPUBLIC: THE INSUFFICIENCY OF EXPANDED HUMANISTIC RHETORIC IN THE SERVICE OF COMPARATIVE LAW

*Richard O. Brooks**

I.	INTRODUCTION	73
II.	CICERO'S HISTORY.....	76
	A. <i>Cicero and Republican Rome</i>	76
	B. <i>Cicero's Law Related Writings</i>	77
	C. <i>Cicero's Rhetoric and Comparative Law</i>	80
III.	CICERO'S RHETORICAL COMPARISON AND ITS MODERN SUCCESSORS.....	81
IV.	THE FALL OF ROME, CICERO'S TRAGIC DEATH: THE LESSONS FOR MODERN COMPARATIVE LAW	83
V.	CICERONIAN RHETORIC AND THE DECLARATION OF HUMAN RIGHTS	86
VI.	CONCLUSION	88

I. INTRODUCTION

We are now at the beginning of the twenty-first century. The United States, like Republican Rome two millennia earlier, teeters between becoming an expanded empire, a declining republic, or paradoxically, both. Like the Rome of Cicero's time, new powers are arising on the periphery of the United States' sphere of influence. The European Union is gaining

* Professor Emeritus at Vermont Law School. I wish to thank Professor Carl Yirka and Associate Professor Betsy Baker for comments on previous drafts, and Laura Gillen for her editing and typing.

This paper is part of two parallel projects which I have undertaken in the past decade. The first is the editing of a series of volumes seeking to explore the relevance of ancient authors to modern law. See generally ARISTOTLE AND MODERN LAW (Richard O. Brooks & James Bernard Murphy eds., Ashgate Publishing Ltd. 2003); PLATO AND MODERN LAW (Richard O. Brooks eds., 2007); CICERO AND MODERN LAW (Richard O. Brooks ed., Ashgate Publishing Ltd. 2009). The last book offers the material for my conclusions on Cicero in this article. James Murphy and I are presently engaged in preparation of a volume titled St. Augustine and Modern Law. The second project is a series of articles on the contributions which these authors make to a new understanding of modern comparative law. The previous articles include: Richard Brooks, *The Emergence of the Hellenic Deliberative Ideal: The Classical Humanist Conception of Comparative Law*, 30 *Hastings Int'l & Comp. L. Rev.* 43 (2006); Richard Brooks, *The Cultivation of Cosmopolitan Detachment in Comparative Law: The Hellenistic Contributions*, Vol. 7. Iss. 2 *Global Jurist* (2007), available at <http://www.bepress.com/gj/vol7/iss2/art6> (last visited Oct. 5, 2009) [hereinafter Hellenistic Contributions].

economic power through its partial unification of governmental functions and elimination of economic barriers among western and eastern European nations. China and India are emerging as world economic powers. A fundamentalist Middle East is stirring. Just as trade and Roman influence spread across the "Roman world" in the days of Cicero and after, we are now witnessing the globalization of communication, immigration, economic markets, environmental problems, economic problems, and war.

These modern events beg for a better understanding of both international law and the domestic laws of a myriad of nations and localities. Cicero also believed that a better understanding of other states, especially Greece, was important for the Romans of his day. Therefore, the question arises as to whether Cicero's writings hold lessons for us today. More specifically, does Cicero offer anything of importance to the fields of modern international law and comparative law?

The important contribution of international and/or global law to the resolution of these modern problems is evident; the role of comparative law less so. The discipline of comparative law seeks to compare, contrast, and evaluate the laws of nations and other political communities. To do so, it is called upon to find the best domestic laws to facilitate markets and resolve other global problems. The comparison aids in the finding of universal principles and legitimate modes of legal reasoning for unifying or guiding the adoption of domestic laws.¹ Comparative law is also a way to recognize the diversity of legal traditions which teach us to recognize, tolerate, and celebrate² those differences and appreciate them. Finally, the study of comparative laws helps us to identify the imbalances of power which often shape domestic laws and which continue to operate within and among diverse legal regimes.³

1. The four functions of comparative law set forth in this paragraph are well described in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 57–127 (Pierre Legrand & Roderick Munday eds., Cambridge Univ. Press 2003).

Such a notion of diversity and its value is set forth in Peter H. Schuck, *Diversity in America: Keeping Government at a Safe Distance* 75 (2003).

3. Four generic approaches to modern comparative law embody these roles of comparative law. Following the tradition of comparative and international law in the early modern period, one approach seeks to uncover the universal principles among diverse present and past legal regimes. For an example, *see generally* JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT* (2006). Mutual recognition of these universal principles facilitates agreements among different regimes, as well as highlighting the differences of policy or positive law. The second approach to comparative law begins with common and shared problems to which different legal regimes have taken different approaches. These common problems offer materials for a prudent evaluation of different laws and legal regimes in their effort to resolve their problems. For a general statement of such an approach, *see generally* JEROME HALL, *COMPARATIVE LAW AND SOCIAL THEORY* (1963). For a specific example, *see generally* MARY ANN GLENDON, *THE TRANSFORMATION OF*

Implicit in all of these approaches to comparative law is a fundamental assumption of progress in history along with a belief in the ultimate reconciliation of incommensurable⁴ legal regimes into a global rule of law. Most modern comparative law assumes that legal regimes are comparable through the sharing of common principles, or the facing of similar problems, or the sharing in global imbalances of power. Alternatively, diverse legal regimes form the materials for a celebration of global diversity. But even those who recognize diversity or power imbalances project some ultimate resolution of the resulting conflicts. None accept the prospect of inevitable conflict which sometimes erupts into internecine violent conflicts not salvageable through human reason in general, nor through the plurality of exercise of sovereignty of law.⁵

To enable comparative law to make its contribution in understanding, if not controlling conflicts, it is useful to return to the period⁶ of late Republican Rome in the last century B.C.E. when leading Romans were struggling to hold on to the republican form of government in the face of political pressures, which were transforming it into an empire. A central figure of that age was Cicero: a statesman, orator, and legal and political philosopher, who ultimately gave his life in a futile effort to save the Roman Republic. Before his assassination, Cicero traced the outlines of a general philosophy, as well as a philosophy of the republic and its laws. If

FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE (1989). The third approach to comparative law seeks to explore beneath the facade of law to uncover how regimes have been shaped by historical and economic forces resulting in present imbalances of power between classes and nations. Among other benefits, such an approach can document the variety of forms of discrimination found in legal relations and lay the basis of efforts to confront dominant regimes and secure emancipation from them. A final approach seeks to grasp the unique legal tradition and culture of the different "national" regimes in order to recognize and appreciate the cultural richness and diversity of traditions within the legal world. See PATRICK H. GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 5 (2000).

4. For an excellent and deep treatment of the incommensurability of systems of thought and value, see generally WALTER WATSON, THE ARCHITECTONICS OF MEANING: FOUNDATIONS OF A NEW PLURALISM (1985).

5. The argument against assuming that peace is possible with a plurality of nations and, hence, the proposal for the insurance of peace through global sovereign rule was laid out by Hobbes and a more recent approach was suggested by MORTIMER J. ADLER, HOW TO THINK ABOUT WAR AND PEACE 236 (Fordham Univ. Press 1995) (1944).

6. The Ciceronian period, Cicero's legal philosophy and its subsequent history is discussed in my Introduction to CICERO AND MODERN LAW xi (Richard O. Brooks, Ashgate Publishing Ltd. 2009), as well as the articles in the volume. Carl Yirka and Nicholas Dreher have prepared an extensive bibliography which is contained in the volume. *Id.* at xl. This bibliography also sets forth the translated works of Cicero and a comprehensive list of law related articles on his work. *Id.* Rather than festoon this article with the myriad of footnotes contained in that introduction as well as the myriad of articles in the volume, I am content to simply refer the reader to that volume, its introduction, and articles.

these laws were adopted, he believed they would grant stability to the Roman Republic enabling it to survive for centuries. Although Cicero's approach bears some striking resemblances to the underlying optimistic assumption of modern comparative law, Cicero's solution differs in some fundamental ways and may suggest a different and more "rhetorical" approach to modern comparative law.

In this article, I shall briefly review the historical situation which Cicero faced, in part because this situation resembles in many ways our own age. Then I shall turn to Cicero's writings, summarizing those which are relevant to comparative law. In the third section, I shall discuss the approach which Cicero takes to comparative law. In the final section, I shall briefly review the adoption of the United Nations (UN) Declaration of Human Rights as exemplifying a "Ciceronian approach" to comparative human rights. I shall conclude with the observation that the events following Cicero's death, the beleaguered history of humanism in the Western world, and the current political situation all suggest a profound pessimism regarding the current humanistic approaches to comparative law.

II. CICERO'S HISTORY

The life, works, and death of Cicero yield an understanding of our current situation in which the present republics in the East and West seek to preserve and improve their legal regimes. Cicero's discussions of law were not mere scholarly undertakings, but the work of an active statesman and rhetorician with a commitment to the preservation of a republican form of government in a tumultuous ancient world.

A. Cicero and Republican Rome

Every effort to see and understand other political communities is necessarily conducted through spectacles acquired in one's own country. Therefore, when Cicero looked at recently conquered Greece, Gaul, Carthage, or the provinces of Sicily, he viewed them through the lens of his Republican Rome and its triumphal history. By the time of Cicero's birth or early childhood, Rome had won its battles over its neighbors and was ready to open itself up to the influences of its conquered provinces. Citizens from these provinces flooded Rome itself (not unlike present immigrants flood the U.S. and Western Europe).

In the course of its march to victory, Rome had slowly fashioned a mixed regime for itself which included an aristocratic (or oligarchic) Senate, popular assemblies, and a variety of magistrates, who managed both internal affairs and the conquered provinces. In some ways, such a mixed regime is similar to the practice, if not the theory, of modern American

democracy with a democratic or oligarchic (although elected) representative body, a large administrative class, and an “aristocratic judiciary.” In Republican Rome, these magistrates included consuls, some of whom, like Caesar, held generalship of the Roman armies.⁷ It was this Rome-based republican government which assumed responsibility for the governance of its far flung conquered regions.

In the late Republic period, when Cicero held his offices, rhetoric or generalship were avenues to power and Cicero, relying upon the former, spoke eloquently in the Senate, the popular assemblies, and elsewhere, urging or opposing legislation, prosecuting and defending his clients, and praising or condemning leading Roman figures. During the course of his career, the power of the popular assemblies, and the Roman crowds, increased. Moreover, successful generals pursued political and military power and rewards for themselves and their soldiers. Cicero’s life itself was marked by political struggle, exile, and civil war. By the time of his second “forced retirement,” the decline of the Republic and its final civil war was soon to lead to Rome’s transformation into an empire.⁸

B. Cicero’s Law Related Writings

Cicero’s view of the republic and its laws was not simply the response to the desperate situation of the Roman republic in the mid-first century B.C.E. His view embodied a broad historical view in which Rome and the other republics were seen as subject to the cycles of history; these cycles in turn reflected the cycles of a Stoic universe. According to Cicero, who borrowed much from the historian, Polybius⁹, Rome could only secure a stable place in history and escape the cosmic cycles by adopting a mixed governmental structure through which citizens might participate. That participation, *i.e.*, political liberty,¹⁰ in turn, required the skill of rhetoric, to be practiced in each of the assemblies within government. For Cicero, the skill of rhetoric rested upon knowledge of history, philosophy, and the arts of language. Thus, there was an essential connection between Cicero’s

7. For an excellent description of the Roman Republic, *see generally* ANDREW LINTOTT, *THE CONSTITUTION OF THE ROMAN REPUBLIC* (1999).

8. For a recent biography, out of the myriad of biographies of Cicero, *see generally* ANTHONY EVERITT, *CICERO, THE LIFE AND TIMES OF ROME’S GREATEST POLITICIAN*, (2001).

9. POLYBIUS, *THE RISE OF THE ROMAN EMPIRE* 35 (Ian Scott Kilvert trans., Penguin Books 1979).

10. For a classic discussion of political liberty in the Roman Republic, *see generally* CHAIM WISZUBSKI, *LIBERTAS AS A POLITICAL IDEA AT ROME DURING THE LATE REPUBLIC AND EARLY PRINCIPATE* (2nd ed. 1960). A modern version of the ideal of political freedom in the United States is STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 3–12 (2005).

rhetorical humanism and his ideal of the stable republic as set forth in his writings on rhetoric, politics, and law. In these writings, Cicero set forth the tenets of a rhetorical method for protecting and preserving the republic and the laws which serve it.¹¹

Cicero was not an author of technical legal treatises; indeed, he made fun of such treatises and later legal scholars returned the compliment by denigrating Cicero's contributions to Roman law. Rather, Cicero's writings, which indirectly pertained to law, dealt with rhetoric, social, political, and general philosophy. Although Cicero's writings spanned his lifetime, including an early youthful treatise on rhetoric, Cicero's mature response to the plight of the republic was in his later works on the republic, the laws, and his major treatise on rhetoric. With his forced retirement and political failure at the end of his life, he completed a final avalanche of work, including minor rhetorical treatises, other law related writings, and philosophical works. His rhetorical works were built upon his youthful rhetorical education in Rome and Greece and his successful oratorical career. His political and legal works reflected his knowledge as an experienced Roman statesman who held most of the major magistracies of the government; his later works, intended to bring Greek philosophy to the Romans, based again upon both his early and late philosophical education, an education informed by visits to Greece throughout his life.

Cicero offered a vision of the Republic—an uneasy combination of an ideal government, but one exemplified by Rome and her history. Cicero accepted the cycles of history set forth by Polybius, and believed that the Roman Republic had reached its zenith before the final century B.C.E. On a more philosophical level he understood the political community to arise out of natural needs, but which could only be satisfied in “a partnership under law.” These needs were conjoined through the rhetorical power of leading individuals who made unification possible.¹² The community was committed to the “*res publica*”—commonly shared wealth, as well as

11. Cicero's rhetorical treatises include: RHETORICA AD HERENNIIUM (G.P. Goold ed., Harry Caplan trans., Harvard Univ. Press 1981) (1954); DE ORATORE (E.W. Sutton trans., Harvard University Press 1996) (1942); BRUTUS ORATOR (E.H. Warmington ed., G.L. Hendrickson trans., Harvard Univ. Press 1971) (1939); DE INVENTIONE (G.P. Goold ed., H.M. Hubbel trans., Harvard Univ. Press (1993) (1949). Cicero's notion of rhetoric was primarily one of oratory, although he also looked to written works. The role of rhetoric in our modern American republic is complicated by institutions of mass media and communication, and, more recently, the computerization of communication. See RICHARD MCKEON, RHETORIC: ESSAYS IN INVENTION AND DISCOVERY 1–24 (1987) [hereinafter *Essays in Invention*].

12. This is an important proposition for Cicero. Unity was not to be found in common needs and a shared concept of justice, as in Aristotle, nor in “generalship” or force as in Hobbes. Unity was to be achieved by shared wealth, a common history and rhetoric, the latter often exercised within a legal context. In short, a pluralism underlay Ciceronian political and legal philosophy. *Id.*

private property and a shared governance process. The structure of this governance was a historically inherited mixed government in which all citizens participated; its various components—senate, magistrates, and peoples' assemblies which were composed of leading wealthy citizens, men of accomplishment, and the citizens of Rome—roughly representing the three principles of wealth, virtue, and need.¹³

The mix of parts of government, classes, and principles was to be held in balance by a sense of justice. Cicero, in his later letter *On Duties*, defined this justice as a "*honestum*," a combination of the individual virtues serving the common good and utility (including the good of reputation).¹⁴ This justice was to be implemented by law and reflected in particular legal rules. Cicero's law was not an autonomous set of humanly adopted rules, but rather rules in harmony with the natural law of the universe serving the functioning of a republic which reflected the workings of that universe.¹⁵ Both *jus* and *lex*, equity and positive law, were to serve the functioning of the republic, just as the laws of the universe served the functioning of the universe itself. Nature, politics, and law were thus inextricably linked to one another.¹⁶

The harmony within and between states was to be achieved through human rhetoric. In the very formation and the continuing conduct of the state, the "rhetor" employed a powerful tool of rhetoric—a rhetoric informed by a human reason, since it incorporated the full range of human knowledge including history, philosophy, politics and ethics, language, and human psychology. Through his eloquence, the rhetorician was able to persuade conflicting peoples to enter and remain together in a community under law. Rhetoric was the instrument of political freedom—a freedom which facilitated and embodied the participation of the people in the *res publica*.

13. All of this is set forth in Cicero's *DE REPUBLICA, DE LEGIBUS* 71–75 (G.P. Goold ed., Clinton Walker Keyes trans., Harvard University Press 1988) (1928).

14. The unity and tension between virtue and utility is one of many modern touches in the Ciceronian beliefs. See *LETTERS TO QUINTUS AND BRUTUS* 13 (D.R. Shackleton Bailey ed. Jeffrey Henderson trans., Harvard Univ. Press 2002) (1972).

15. Although Cicero was eclectic, drawing upon many philosophic sources, see generally *De Republica De Legibus*, *supra* note 13, he clearly drew upon Stoic beliefs. His natural law found its way into Aquinas' account of natural law, where he was cited frequently.

16. See generally *id.*

C. Cicero's Rhetoric and Comparative Law

Not only is rhetoric a subject of some of Cicero's writings; a rhetorical method lies behind all of Cicero's writings.¹⁷ Cicero viewed his work as unifying philosophy and rhetoric to combine wisdom and eloquence. As a consequence, he approaches philosophy, political theory, and comparative law in a rhetorical manner. For example, in his *Republic*, his overall purpose is to exhort readers to public service. In his *Laws*, his effort is to establish a study of law based upon universal principles rather than a law based upon the knowledge of particulars in service to specific legal problems. The method of rhetoric for Cicero was laid out in his early rhetorical treatise and expanded in later work. In that treatise, he suggests that the method of argumentation in rhetoric begins with facts which lead to the statement of issues. These issues are ones of fact, definition, argument, and judgment. Sides are chosen and arguments on behalf of each side are offered. Then a judgment is made based upon the probability of the most persuasive argument.¹⁸

Cicero believed in human reason drawing upon the reservoirs of knowledge of the past and expressed in a rich rhetoric of the present—a rhetoric which brought the liberal arts to bear upon persuading people to live together in a community. It is this rhetoric which lies at the heart of Cicero's approach to law. In describing the unifying power of rhetoric, Cicero acknowledged pluralism within the state—a pluralism which he recognized in his everyday political life and which he viewed as the product of different human needs and capacities. He also recognized this pluralism in the variety of ethical, philosophical, and religious beliefs and, by implication, various political and legal regimes. Cicero believed that rhetoric was a tool of public action, and hence, it is fair to say that he was the founder of "civic humanism," *i.e.*, the later renaissance belief of the value of civilized participation in the affairs of the city-state.¹⁹ Finally, such action, whether in pursuit of glory or the justice of the *res publica*, was ultimately the pursuit of *honestum*, defined in terms of social virtues, and utility—both of which were to be balanced through justice and political liberty and both achievable in history.

17. See Cicero & Modern Law, *supra* note 6, at 574.

18. This rhetorical method is described in Michael J. Buckley, S.J., *Philosophic Method in Cicero*, in Cicero and Modern Law 359 (Richard O. Brooks ed., Ashgate Publishing Ltd. 2009). See also, Walter Watson, "Invention" *ENCYCLOPEDIA OF RHETORIC* 389–404 (Thomas O. Sloan ed., Oxford University Press 2001).

19. For one of many accounts of civic humanism in the renaissance, see RENAISSANCE HUMANISM FOUNDATIONS, FORMS, AND LEGACY, in 1 HUMANISM IN ITALY (Albert Rabil, Jr. ed., University of Pennsylvania Press 1988).

Given such a rhetorical turn, Cicero's method can be seen in his approach to comparative law in the Republic. In *Book I*, he begins with the facts of the origin of the commonwealth, poses the issue of what is the best constitutional form of the commonwealth, examines the different forms suggested and explores the arguments, pro and con, for each form of government. Then, to make a judgment among them, he measures them against the criteria of stability and the "best regime" (but this best regime is not an imaginative ideal as with Plato, but rather the existing state of Rome itself). In *Book II*, he adds a third criterion when he traces the history of Rome—a history which ultimately reveals the standard of justice in states. Hence he ultimately propounds three standards: stability, comparison with Rome, and justice by which to compare various regimes. In *Book III*, he explores the issue of whether justice should be a standard at all, setting forth arguments pro and con, and following with a judgment that justice is indeed the proper standard and a mixed constitution best meets that standard. In the later books, he follows out the implication of this ideal for Rome in her order of society and the roles of her statesmen. The final book contains the dream of Scipio, which links the laws of Rome to the motions of the universe, suggesting that political participation or *libertas* in Rome, is ultimately a participation in the workings of the rules of the universe.

III. CICERO'S RHETORICAL COMPARISON AND ITS MODERN SUCCESSORS

Cicero's rhetorical approach to comparison of regimes seems ages away from modern comparative law. This is because, until recently, comparative law was dominated by the Enlightenment scientific ideal.²⁰ In 1900, with the First International Conference of Comparative Law, comparative law was informed by an enlightenment ethic which sought a science of law in general and a science of comparative law in particular. Comparative laws were to be discovered in the "scientific" classification of legal "families" and the comparative law of nations was to be ordered according to an evolutionary perspective in which each nation's laws were to be measured on an evolutionary scale. Echoes of these scientific approaches can also be found in an American legal realism approach to comparative law which looked at comparative law through the lens of the social sciences and "policy sciences."

Recently, however, comparative law has undergone an "interpretive turn" in which legal systems are subjected to interpretive disciplines rather than being treated as objects of science. As a consequence, comparative

20. For a brief early history of comparative law, see generally JEROME HALL, *supra* note 3. In my earlier articles in this series, I have offered a critique of this enlightenment ideal. See generally Hellenistic Contributions, *supra* note *.

laws are viewed as expressions of human culture in which the interpreter may participate. These interpretive approaches may be discerned in each of the four “heritages” of comparative law: colonialism, nationalism, universalism, and functionalism. The first two resemble Cicero’s recognition of the pluralism which he faced in the politics of Rome as a setting for the exercise of rhetoric. The second two approaches resemble Cicero’s efforts to find common criteria within which to judge competing regimes. Let me provide a fuller explanation.

Like Cicero, students of colonialism recognize the pluralism of legal regimes, within a pattern of “colonial domination” of one class, nation, sect, gender, or race over “the other.” Comparative law “nationalists” recognize the rich diversity and individuality of national legal traditions and their changes over time, just as Cicero recognized different ethical, religious, and political beliefs within Rome. Like the colonialists, Cicero viewed diversity as constituting conflicts, but unlike the colonialists, who view the conflict in terms of power, Cicero viewed the conflict in terms of conflicting rhetorical argumentation. For Cicero, rhetoric is then a mode for rationalizing conflict.

In Cicero’s rhetorical method, one turns from argumentation within contending legal regimes to the need for judgment among them. Such a judgment, we saw, requires criteria of decision. Comparative law’s “universalism,” like Cicero, turns to stability and justice which seeks to find universals within the legal principles implicit in the course of history’s complex path. Comparative law functionalists seek to articulate shared problems as criteria for selecting among alternative legal regimes and laws, just as Cicero adopts the need for stability and justice as the criterion for judging different regimes. Thus, when different camps of modern comparative law search in the past for universals, identify a pluralism of groups and conflicting power, recognize diversity of unique legal cultures and seek to resolve common problems, they echo the many facets of Cicero’s thought.

However, unlike the present “camps” of comparative law, Cicero offers one unified vision of comparative law which recognizes diversity but also conflict among different regimes and peoples. Cicero accepts the reality of inequality of power but seeks to mitigate the struggle resulting from such inequality through balances of power within a mixed government. Cicero finds universal principles within history of different regimes, but he recognizes that these principles must be applied. For Cicero, solutions to common problems among conflicting regimes are to be resolved through a rhetoric which can apply universals to concrete situations through rhetorical argument and consequent action. Thus, Cicero

offers a unified vision of comparative law through the steps of a rhetorical method.

IV. THE FALL OF ROME, CICERO'S TRAGIC DEATH: THE LESSONS FOR MODERN COMPARATIVE LAW

If one were to recount the conclusions of Cicero's texts and track his account of the triumphant role in the history of humanism up to the present time,²¹ a certain undeserved optimism might overtake us and we might simply celebrate the modern humanism adopted by the current state of comparative law. Cicero's texts of politics, law, and philosophy paint a happy picture of the harmony of a republic through the exercise of rhetoric. But there is a darker side to the story of Cicero—a story which begins with the actual speeches of Cicero and continues with his assassination and the subsequent fall of Republican Rome. The actual speeches he gave paint a very different picture. Whether the early pre-consul speeches in which he practiced his craft of defense, or his consular speeches when he prosecuted the Cataline conspiracy, or the defense of Milo, who murdered Cicero's arch enemy, Clodius, or his *Philippics* against Anthony, his speeches set forth a floridly complimentary portrait of his client, (and himself dressed in the mantle of virtue of the republic) while the speech portrayed his opponents as evil malefactors. In other speeches Cicero was not above praising the dictators, Pompey or Caesar, when they were judges in his trial. The lessons one takes away from such rhetoric is not that it advances the unification of the republic but rather that it seeks to defeat the opponent at all costs.

Take for example, Cicero's quarrel with Clodius, his political enemy. Cicero, as Consul, executed some of Clodius's friends without seeking approval of the Assembly as required by the letter of Roman law. Cicero was exiled after these events. It is thought that Cicero's appeal to natural law in *de Legibus*, written during or after his exile was, in part, a philosophic justification by appeal to a "higher law" of his "illegal" actions. Following up Milo's murder of Clodius, Cicero defended Milo in what appeared to be an open and shut case against Milo. In doing so, Cicero employed all of the rhetorical tricks of the defense lawyer's trade. He put Clodius on trial and assaulted his deeds and character as part of his self defense plea for Milo.

The savagery of Cicero's oratory is best illustrated in his second *Philippic* against Anthony, a member of the Triumvirate:

21. The history of Cicero's thought is set forth in books and articles cited in Section VI of a comprehensive bibliography prepared by Nicholas Dreher and Carl Yirka in *Cicero & Modern Law*, *supra* note 6, at xlix-lii.

You donned the toga of manhood, but you soon turned it into a womanly costume. At first you were a common whore, and you could count on a fixed price—a high one at that—for your disgrace. But right away Curio intervened, rescued you from a prostitute's daily trade, and, as if he awarded you the gown of matronhood, he set you up in stable certain matrimony. No slave bought to satisfy lust was ever as much in his master's power as you were in Curio's. How many times did his father throw you out of his house? How many times did he post guards to keep you from crossing his threshold? But you, with night as your accomplice, lust as your advisor, money as your master, were lowered in through the roof. . . .²²

It was the taking of sides among political rivals through savage speeches that earned Cicero his savage death. The death is described in the words of Plutarch:

[b]ut in the meantime, the assassins came with a band of soldiers Finding the doors shut, they broke them open and Cicero, not appearing . . . Philologus informed them the tribune was on its way to the sea through the close and shady walks. The tribune, taking a few with him, ran to the place where he was to come out. And Cicero . . . commanded his servants to set down the litter, and stroking his chin as he used to do with his left hand, he looked steadfastly upon his murderers, his person covered with dust, his beard and air untrimmed, and this face worn with troubles. So that the greatest part of those stood by covered their faces whilst Herrenius slew him. And thus was he murdered, stretching forth his neck out of the litter, being now in his sixty-fourth year. Herennius cut off his head and . . . his hands . . . Antony commanded his head and hands be fastened up over the rostra where orators spoke: a sight which the Roman people shuddered to behold and they believed they see there not the face of Cicero, but the soul of Anthony. . . .²³

The fall of the Roman Republic followed shortly after Cicero's death. All of Cicero's "humanistic" oratory and writings could not save it. He failed to stop Anthony, quell the tumult of the masses, and protect the power of the Senate. What followed was the rise of a brutal empire, which despite its glory, perpetuated cruelties on its residents and the outside world.

22. *Cicero's Second Phillipic* 2.44–5 in SHANE BUTLER, *THE HAND OF CICERO* 121 (2002).

23. Plutarch, *The Lives of the Noble Grecians and Romans: The Dryden Translation* 723 (Philip W. Goetz ed. Encyclopedia Britannica, Inc. 1992) (1952).

The failure of Cicero's eloquence is a cautionary tale for all who seek to save the world through philosophy and eloquence, but a clarity of historical knowledge as to the Roman republic is important. Cicero did not fail to save the republic simply because of his participation in the conflicts of the age.

In the words of one well respected student of the late Roman republic:

[the history of the Roman republic] conjures up a potent image: the disintegration of Roman society that purportedly set the stage for monarchy and a new order Some discern a moral rot at the vitals of the society, a self centered and divisive spirit that dispersed a once integrated community into warring component parts. The ruling class . . . narrow, selfish and blind . . . ignored the evils of their times, by hoarding their own privileges The Ciceronian period witnessed an age of individualism [with] adherence to powerful and ambitious individuals A political realm was transformed into a cockpit for armies and their commanders [t]he state was incapable of governing an empire.²⁴

So much for the fate of Cicero's rhetoric. It was a puny instrument for coping with the larger forces at work in Rome. This rhetoric, like the modern interpretive treatments of comparative law, is part of the tradition of western humanist assumptions. Unfortunately, the historical consequences of humanist thought, after Cicero and through the ages, do not provide more hope. To be sure, humanism found literary expression in the Renaissance, in the Enlightenment and even in the twentieth century.²⁵ Yet, the results of such humanism were not much better than Cicero's fate.

For example, after and during his major writings, the renaissance humanist, Petrarch, moved from place to place to escape the plague and his enemies. The civic humanist, Machiavelli, wrote his treatises after his stay in jail. Out of power and employment, he wrote his works while the Italian republics were tossed about in the broader currents of Italy's power politics and European wars. Another great humanist was the German poet, philosopher, and scientist, Goethe. After all his works, in his old age, Goethe regarded the world "a madhouse" and, after witnessing the French and American revolutions and the Napoleonic wars, concluded "men exist

24. ERIC S. GRUEN, *THE LAST GENERATION OF THE ROMAN REPUBLIC 498* (1974) (lists these factors of the Republic's collapse but cautions: "The collapse of the Republic is a convenient phrase—and a deceptive one").

25. For a readable portrait of this tradition, see generally ALAN BULLOCK, *THE HUMANIST TRADITION IN THE WEST* (1985).

only to trouble and kill one another”²⁶ Even the bucolic English Lake poets, Coleridge and Wordsworth, who helped us to “dance with the daffodils” watched with foreboding the onrush of an industrial revolution in England—a revolution which was more honestly described by Karl Marx. The grand humanist age of Vienna and Budapest at the turn of the twentieth century was swallowed by the Eastern European conflict and World War I.²⁷ The golden age of German Weimar was a presage to the depression and World War II.

Even events since this World War offer sobering lessons, such as: the dropping of the atomic bomb, the September 11th bombings of the World Trade Center, the tragedy of Iraq, and the genocide in Africa and elsewhere.²⁸ This modern history suggests that humanistic rhetoric, whether simply located within the covers of a book, like an elegant if wistfully nostalgic pressed flower, or a belief adopted by the educated elite of a nation, (including comparative law scholars!), will not stem the advent of massive and catastrophic evil. Rather than optimism, the full story of modern history should yield profound pessimism. It is the dark threat of such massive evil which is the fundamental challenge of all law, including both international and comparative law.

In this regard, perhaps one of the most persuasive but sobering humanist books at the end of the twentieth century is Jonathan Glover’s *Humanity*²⁹ which recounts the World Wars, the Holocaust, Stalin’s purges, and Hiroshima. The trail of suffering which has followed the progress of technology and flowering of egalitarianism is a sobering reality for those who argue on behalf of humanism.

V. CICERONIAN RHETORIC AND THE DECLARATION OF HUMAN RIGHTS

One signal example of a modern effort of rhetoric to conquer the divisions between different nations is the adoption of the UN Declaration of Rights in 1948.³⁰ United Nations Educational, Scientific, and Cultural Organization (UNESCO) convened a group of philosophers who completed

26. Will Durant & Ariel Durant, *Rousseau and Revolution* 627 (1967).

27. Carl Schorske, *Fin-De Siecle Vienna* xxvii (1981).

28. Paul Bookbinder, *Weimar Germany, The Republic of the Reasonable* (1996); David Abraham, *The Collapse of the Weimar Republic: Political Economy and Crisis* (1986).

29. For a discussion of this history, see generally Jonathon Glover, *Humanity: A Moral History of the Twentieth Century* (1999).

30. Universal Declaration of Human Rights, G.A. Res. 217A, at 71 U.N. GAOR, 3d Sess. 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). An account of this declaration is given by MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

a detailed study of both rights and democracy. This study was the beginning of a process in which representatives of the nations came together and agreed upon the final declaration. The adoption offers a test case for comparative law, since different legal regimes embraced different philosophies of democracy and rights. In the UNESCO studies, these different philosophies were articulated, agreements and differences identified, and a broad declaration for rights was set forth.

Thus, in a process which embraced philosophic study, political dialogue and bargaining, as well as rhetorical conclusions, the UN members overcame their differences and adopted the Declaration. It is useful to view the declaration of these rights as a set of rhetorical principles for several reasons. First, they embodied the Ciceronian purpose of rhetoric to convince audiences. They were proposed in large part not to induce immediate action of implementation, but rather to rhetorically convince the nations of the world and their different cultures to adopt appropriate public policies within their respective nations.³¹ Second, these principles were not based upon a philosophical consensus about the bases of such rights—in fact, when UNESCO's effort to explore the notion of human rights as a basis for the Declaration, agreement could only reach a general statement of rights, without a similar agreement on the foundation or rationale of these rights.³² Similarly, in the process of adopting these rights within the UN, the parties, while agreeing upon the provisions themselves, could not agree upon the implementation of the rights themselves.³³ Hence, it can be said that such a broad statement of the rights was rhetorical, rather than philosophic or practical.³⁴ Calling them "rhetorical" does not denigrate them; the declaration has had an effect upon the consequent adoption of rights statements in various countries and some of these statements have been implemented in various ways since their adoption. Nevertheless, on a more general level, the international events which have taken place since they were adopted do not give grounds for optimism. Many of these rights are still violated, even by the nations which voted to adopt the Declaration.

31. The effort to reach agreement on rights is set forth in *HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS* (United Nations Educational And Cultural Organization ed., 1949). The architect of the effort to reach rhetorical agreement upon broad declarations of freedom was the rapporteur, Richard McKeon, a philosopher who had a keen sensitivity to the plurality of philosophy.

32. This approach was devised by Richard McKeon and set forth in another product of UNESCO at the time, *i.e.*, see generally *DEMOCRACY IN A WORLD OF TENSION: A SYMPOSIUM PREPARED BY UNESCO* (Richard McKeon ed., 1951).

33. See generally *id.*

34. It was not philosophic, since it lacked a common set of premises for the rights, their nature and existence. It was not practical, in the sense that the implementation of the statements of rights required further specification and agreement.

VI. CONCLUSION

The history of humanism sheds a somber light upon the already dark fate of Republican Rome. We can only honor Cicero if we focus on his writings and ignore his fate. Similarly, despite the advances of rhetoric over time, advances which one can celebrate as the brief golden moments in history when humanism, humanists and humanistic rhetoric are recognized, the humanist philosophy seems anemic in the face of the brutal realities of history. It appears to be more of a hope than a solid accomplishment.

In light of the sad history of Cicero's humanistic rhetoric and humanism in general, the current humanistic assumptions of comparative law make it seem to be a rather weak response to the problems of our age. Such humanism seems unable to cope with violent conflict and significant evil in the world. As Hegel has observed, large scale, excessive, and intense human harms visit each stage of history. To be sure, humanistic comparative law offers a salve on some of the day-to-day wounds of life which can be eased by the application of its perennial principles and its rich and various traditions. But such study is, at most, a consolation in the world in which we live.

The lesson of the fate of Cicero and current humanism suggests that a reorientation is needed in which the root causes of conflicts and resultant evils are identified, existing legal institutions to cope with such evils are comparatively assessed, and legal institutions are devised or strengthened to cope with such conflict and evil.³⁵ In short, the lessons of Cicero's writings offer a fine civic humanism; the fate of the Roman Republic and modern humanism demands something more.

Similarly, the current humanism found in the scholarship of international and comparative law is a fine statement. But the central question is: how will it help to stop a Rwanda, an Iraq, a September 11th? What is needed is a wiser comparative law which faces up to conflict and evil in the world.³⁶ Historically, awareness of such evil came after Cicero finding its expression especially in Christianity and the works of St. Augustine. Even later came the recognition of the need for more centralized international governance. It remains to be seen whether these later developments suggest a new approach of comparative law, which can

35. The recent works on evil by John Kekes and Paul Kahn suggest the approaches which are needed. JOHN KEKES, *FACING EVIL* (1990); JOHN KEKES, *ROOTS OF EVIL* (2005); PAUL KAHN, *OUT OF EDEN: ADAM AND EVE AND THE PROBLEM OF EVIL* (2007).

36. James Murphy and I are currently working on the editing of a volume entitled, *St. Augustine and Modern Law*. St. Augustine confronts evil in history, although a later history of evil and the evils committed by Christianity raise serious questions about whether a faith based or informed comparative and international law is any better.

help us to better understand what is happening in our world today and cope with world events.