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Schlesinger: Comparative Law: Cases-Text-Materials (Second Edition)

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COMPARATIVE LAW: CASES—TEXT—MATERIALS (Second Edition). By *Rudolf B. Schlesinger.* Brooklyn: The Foundation Press. 1959. Pp. xliv, 635. $11.

The communication soliciting this review suggested that "it would be most useful to have the book reviewed by one who does not belong to the small clique of professional comparatists, and who might have a fresh point of view." If to some it seems sacrilege for one with no standing in the select circle to pass judgment, let it be remembered that *volenti non fit injuria.*

The professional comparatist reviewing this book will have much to say about its suitability as a teaching tool. This I cannot do, though I have no reason to doubt its superior quality for that purpose. At least it is an immensely readable, well organized, and informative book, with well-selected cases and well-written text. It is full of provocative questions, and is completed by a magnificent collection of bibliographical information, both in the footnotes and in a hundred-page classified bibliography. However it may serve for teaching purposes, it should prove an excellent guide for self-education in the field, at least within the channels laid down by the main objective of the author. I have only one criticism of the book, considered within its own frame of reference. The dialogue among Comparovich, Smooth, and Edge (pp. 201*ff*) seemed to me a cumbersome way to convey information, as compared with a systematic and straightforward exposition. But this may be only a personal idiosyncrasy in one who shamefacedly confesses that he finds artificial and contrived even the dialogues of the first master of the genre.

Any contribution I can make must lie in another direction—in the expression of an outsider's reaction to the conception of the comparative law course that is implicit in this book. Professor Schlesinger has effectively and succinctly characterized the main thrust of his work by saying that its primary objective is "to convey to the student 'that modicum of understanding' and of familiarity with concept and terminology which will make it possible for him 'really to grasp an opinion of local counsel', and I might add, to write an understandable letter asking for such opinion." (p. *xvi*) Though in the present edition, by contrast to the first, the author recognizes that there may be other objectives, and makes a conscious effort to enrich the materials so that they can be implemented, still his original objective has cut the channel within which this set of materials runs. This is a "practical" book, designed to teach American students how to deal with foreign problems in the context of day-to-day law practice. This orientation is emphasized by the book's concentration on (and indeed its limitation to) those legal systems with which we have "the most significant human and commercial contacts." (p. *xvii*) The book offers a program of instruction in the legal problems of dealing across international boundaries, with detailed treatment of some domestic law topics that might be taken up in Conflict of Laws or in Procedure (but are not).[1] It provides training in "bread and butter" law to pragmatic American law students who must be "sold" on any course that is not on the bar examination. Selling the students is constantly in the author's mind. Thus, in introducing the illustrative substantive law problems that he uses for detailed comparisons, he says: "Agency, Corporations and Conflict of Laws . . . are of particular importance to the international practitioner serving American and foreign

[1] Thus pleading and proof of foreign law occupies over a hundred pages out of fewer than five hundred.

businessmen. The subject of Conflict of Laws . . . necessarily impinges upon every transaction across international boundaries; and the appointment of agents as well as the choice of a form of business organization is a threshold problem unavoidably facing every lawyer whose clients engage in foreign business. *No apology is needed, therefore, for the choice of these illustrative subjects.*" (pp. 392-393, italics added) No apology is needed, indeed, for a practical course, taught in a professional school, designed to teach practitioners to serve their clients and make money. But justified in practical terms, the course should stand or fall by the tests of the academic marketplace. If its justification rests on no higher ground, its votaries should dispense with the aid of the "mystique" that helps sell the course to faculties, if not to students. However, when Professor Schlesinger makes his case for the practicality of comparative law, saying that "it has become an everyday chore for members of the legal profession in this country to exchange views and information with lawyers in Paris, Zurich or Montevideo," (p. *xv*) he is speaking with the bias of a New York City lawyer—even a particular kind of New York City lawyer. Most lawyers in Denver and Bismarck and Amarillo, not to speak of Chicago or Detroit, even in mid-twentieth century, would spend a long professional lifetime in the law with no professional need, ever, to be aware of the very existence of Paris, Zurich, or Montevideo. If comparative law must stand or fall, in this country, by the tests of the marketplace, it will probably be a senior elective course, or even seminar, in the national law schools, and in some of the other schools training men for big city practice in the Northeast or on the Gulf Coast. This is the more true now that a lawyer may place on his bookshelf, for $11.00, a book that will quickly provide him with the beginnings of insight into the problems of international practice, in case of need. Better that he should take another course or seminar in tax, or security transactions, which will provide him a much more dependable source of revenue! It will be long before the proliferation of our international contacts gives to comparative law the practical significance of many of the more lightly elected senior courses. The overwhelming success of the author's course at Cornell is less a tribute to the "practicality" of the course than to the skill of a teacher reputed to be one of the best in the business. Not every school can do so well for its comparative law program.

If comparative law deserves to be encouraged beyond the pragmatic demands of students, the justification must rest on higher grounds—on those grounds that justify the inclusion in the curriculum of legal philosophy, law and society, legal history, and other "perspective" or "jurisprudential" courses. It must rest on the broader insights that comparative law may provide, even for the lawyer who may never have an international case in his whole career. It must rest on the hope that the law can become a "learned" profession, and on that different sense of "practicality" that finds most utility in sound theory to prepare for the solution of tomor-

row's questions, rather than in "practical" discussion of those that were solved yesterday. It must rest on notions like that of Mr. Justice Holmes, who said that theory was "not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject,"[2] or of Mr. Justice Story, who said: "Many of our most illustrious statesmen have been lawyers; but they have been lawyers liberalized by philosophy, and a large intercourse with the wisdom of ancient and modern times."[3] It must rest on that more adequate appreciation of what is practical which would list as the most valuable mental asset of that eminently practical man, the engineer, the calculus, which is in essence nothing but a tautological and abstract system of logic, utterly devoid of content related to the real world, but a most powerful tool, nonetheless. Though Professor Schlesinger would surely be quick to urge that comparative law provides the broader insights that make it "practical" in this enlarged sense, he seems content to rest his case on the less adequate ground.[4] This is unfortunate only because it tends to confine the materials within a narrower channel than would be the case if the objectives were less "practical."

Professor Yntema's position provides an interesting and sharp contrast. He persuasively and repeatedly preaches that the whole of legal education must be reoriented on the basis of comparative legal science.[5] In his view, indeed, comparison of laws is the nearest equivalent for our subject to that controlled experimental observation of phenomena that constitutes natural science. "The function of legal science," he says, "is . . . to establish the criteria of justice, principally through comparative research. . . ."[6] Just how one can be sure he has found the true criteria of justice by a comparison of laws, whether they are alike or different, Yntema has not made entirely clear. The most exhaustive comparison of technical laws, even if it includes not only common and civil law but all other civilized legal systems and many primitive systems, may permit significant generalizations about positive law, but can tell us little about "justice," if "justice" is not the same as positive law. The criteria of "justice" come from outside the legal system—the system is not closed but is judged in terms of standards it does not create but which are given to it, whether by the will of Deity, or the nature of man, or the wishes of the articulate classes of a particular society. The criteria of justice must be sought, not in a comparison of technical rules of law, but in a wide range of social science and humanistic studies, or in another view, in theology. If Yntema were urging that a com-

2 Holmes, "The Path of the Law," 10 HARV. L. REV. 457 at 477 (1897).

3 STORY, A DISCOURSE PRONOUNCED UPON THE INAUGURATION OF THE AUTHOR, AS DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY, AUGUST 25, 1829, at p. 34.

4 See Schlesinger, "Teaching Comparative Law: The Reaction of the Customer," 3 AM. J. COMP. L. 492 (1954) for a full statement of the author's point of view.

5 See especially Yntema, "Comparative Legal Research: Some Remarks on 'Looking out of the Cave'," 54 MICH. L. REV. 899 (1956).

6 Yntema, "Comparative Legal Studies and the Mission of the American Law School," 17 LA. L. REV. 538 at 545 (1957).

parison of technical law should be the basis for a reconstruction of the curriculum, his position would be untenable. However, his repeated insistence upon the importance to the lawyer of the whole range of humanistic studies suggests that he is really urging that a complete understanding of law must be sought in a study of the interrelationships of law and society in numerous geographical and temporal contexts. Yntema has urged that American legal education went wrong long ago by its emphasis on professionalism, and that the use of "practical" criteria to test inclusion in the curriculum took the law out of the main stream of our cultural life. This also led to a stultifying concentration of academic lawyers on the "spurious" type of research that merely "briefs" or "digests" the existing state of the law in articles, casebooks, and textbooks.[7] What is needed, he feels, is for legal education to get into the main stream of the university tradition, and to concern itself with a scientific search for truth.

One need not agree with Yntema completely to find much of merit in his position. Certainly legal education needs to be humanized and liberalized. Certainly we should give up the illusion that three years can provide all the necessary practical knowledge and skills for a lifetime of practice, and, by giving up the unreal goal, free at least some time to restore to legal education its concern for the larger questions. Certainly we should try to train legal statesmen instead of legal mechanics, even skillful ones—to make of the law a truly "learned" profession.

The curricular implications of this point of view are complex. For present purposes, it means, at least, that comparative law should have larger place in the curriculum, but not for narrowly practical reasons. It should not stand alone, for a mere comparison of technical rules of law has little beyond suggestive value unless it is enriched by a study of the relationship of the laws to the varying social contexts in which they developed. This kind of comparative law has a real contribution to make to legal education and to the advancement of legal science, which is equally the function of the university law school. With the other "perspective" courses, it is an indispensable part of any truly adequate legal education, which aims to make great lawyers and not merely successful lawyers. The law teacher, especially, needs the enlightenment that comparative studies of this broader kind can provide, to give him an additional perspective on his special subjects and a new integrating viewpoint for understanding the law as a whole.

This point of view leads to doubts about Schlesinger's book. Viewed within its own frame of reference, the book is excellent. But perhaps the frame of reference is unduly constricted and the resultant course narrower than it should be. Perhaps even better would be a systematic introduction to a single advanced legal system, in enough detail and completeness to serve as a basis for later specific comparison of laws. Much might be said,

[7] Note 5 supra, at 902.

too, in favor of the inclusion in regular law school subjects of the insights that comparison of laws can provide.

Schlesinger deals elsewhere[8] with the problem of student motivation, and makes this a principal justification for a practically oriented course. This is no Machiavellian device to dragoon the recruits, and law students are probably too smart to be fooled for long if it were. There is no facile answer to the problems created by the "practical" instincts of American law students. It may be, however, that the problem is less student motivation than faculty conviction, and that if faculty were fully convinced of the importance of the comparative and jurisprudential insights, students would accept the judgment. My experience leads me to more pessimism about the interest of teachers than of students. Thus, if a school is about to increase its jurisprudential offerings from one course to two, it is likely that some one will express concern lest some student take both of them. Would such a question be asked about a second tax course?

If faculty attitudes are the key to the matter, it remains to inquire how faculty members can be convinced. If there is justification for my skepticism about the bread and butter significance of comparative law, outside the centers of international trade, then most faculties are not likely to respond to arguments based on practicality. In such case, the course could be "sold" only to faculties, and through them to students, on the broader ground. This makes it important to decide on what basis to construct and to sell the comparative law course.

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[8] Note 4 supra, at 495.