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Comparative Law and Social Theory. By Jerome Hall.

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BOOK REVIEWS

COMPARATIVE LAW AND SOCIAL THEORY. By Jerome Hall; Baton Rouge: Louisiana State University Press, 1963. Pp. 167. $5.00.

Professor Jerome Hall, well known for his studies in criminal law and jurisprudence, turns his attention in the present volume to the place of comparative law in the field of legal and social studies. And the reader, who has made the study of foreign legal systems particularly his own, approaches a book by the author, which bears an exciting title, with a sense of great expectation. It is well known that lawyers, faced with the task of treating their own legal system as a part of sociology, have found it difficult to marshal the manifold perspectives in terms other than normative and are concerned with statutes, their interpretation, the role of case law, the filling of lacunae, with the growth of these rules in the past and with the formulation of new rules for the future. They have given little attention to the social forces which may influence the creation, the observance and the abrogation of rules. More particularly, they have left the task of generalization to the specialist, and Professor Hall, in this volume, contributes to jurisprudential thought in general when he discusses the concept of positive law, the relevance of sanctions, the concept of law for the purpose of jurisprudence, and advances a theory of positive law of his own (p. 78) which bears a certain existentialist flavour (p. 79), culminating in a plea for a clear distinction between the laws of the State and the social reality of law (p. 79). These observations need not be examined here, but they form the background of the discussion on the function and place of comparative legal studies.

The author takes as his starting point the assertion that comparative law is concerned with arid conceptualism, often produces results which are only of parochial significance and not infrequently appears in the form of enumerative tabulation. As his text he relies on the statement by Gutteridge that comparative law is only a method. As his object of attack he fastens on the claim of comparative lawyers that they are concerned with institutions and functions which he finds unsupported by their studies (p. 69). He asserts that the question: "What is comparative law?" may perhaps best be answered by outsiders; in so doing he could have relied on Gutteridge himself, who believed that comparative law may mean all things to all men.[1] For Professor Hall, who provides his own definition (p. 33), it is "a composite of social knowledge of positive law, distinguished by the fact that, in its general aspect, it is intermediate between the knowledge of particular laws and legal institutions on the one side, and the universal knowledge of them at the other extreme." The quest is for common legal concepts and common legal institutions (pp. 30, 59), for generalizations and trends (p. 37), significant trends and patterns of co-variation of variables (p. 40), "middle-range" social laws (pp. 40, 42, 47).

Professor Hall, as a student of jurisprudence, is, of course, at liberty to

1. Comparative Law 26 *passim* (2d ed. 1949).

define the use to which comparative law is to be put for the purpose of assisting the science of jurisprudence, and the insight that it may yield generalizations and trends on a limited scale, either in default or in support of universal knowledge of them, is to be welcomed, for it opens up new vistas for students of jurisprudence who only too often have been forced to rely on the narrow basis of their own law. Matters are different, however, when Professor Hall turns to charge students of comparative law with a lack of direction. As the reader turns the pages, he cannot avoid the feeling that the clock has been turned back to the year 1900, when ideas such as that of a *droit commun législatif* as a general pattern could be put forward as correctives of the excessive legal positivism of that period, and which themselves could claim the validity of positive law. However, much has happened during the intervening sixty years since the First Congress of Comparative Law met and since Roguin, Lehr and others wrote their purely descriptive works. Professor Hall dismisses the efforts of the last half century in a few contemptuous sentences without even mentioning the substance of some of the works, but alone the names of their authors, and without attempting any critical analysis of their contents. Instead he says: "When legal comparatists speak of placing legal rules in social contexts, the initially suggested image is . . . that of placing legal terms or ideas in social contexts. Little has been writen by them what this means or involves, or how it is to be employed to increase knowledge of law" (p. 86). Leaving aside the purely methodological aspects of this statement, the reader's mind turns immediately to such works as Vinding Kruse's *The Right of Property* (1939, 1953), Hedemann's *Die Fortschritte des Zivilrechts im XIX. Jahrhundert* (1910, 1930), Koschaker's *Europa und das Römische Recht* (1947), Gorla's *Il contratto* (1954), and perhaps also to Esser's *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (1956).

Comparative lawyers not bent on jurisprudential investigations will cavil most with Professor Hall's authoritative requirement that their work should seek to establish limited generalizations somewhere between the knowledge of a particular positive law and law in general. Instead, they will be attracted by conceptual and technical differences, in order to examine how a particular social or economic need will be satisfied in the various systems. Professor Hall's treatment of the trust may serve as an example. He says: ". . . the common concept in American and Continental law is found among aggregates of rules of law. The common concept connotes the similarities. It defines a class" (p. 60). Now, the trust is unknown in continental Europe, ostensibly because divided ownership does not exist. Further examination shows that of the various types of trusts, the need for the charitable trust does not arise, given the existence of the *Stiftung* and having regard to the development of the *fondation,* both independent legal entities; that the family settlement received the death blow during the French revolution, to be revived to a limited extent;[2] that the institution

2. Code Civil arts. 896 *et seq.*, 1048 *et seq.* (France); Bürgerliches Gesetzbuch §§ 2100 *et seq.* (Germany).

of heirship excludes an intermediate owner, while the need for the creation of commercial trusts *inter vivos* is an unfulfilled desideratum. Upon further examination, it appears that it is not the *numerus clausus* of proprietary rights —the existence and justification of which invites an examination by itself—but the absence of the general concept of *subrogation réelle* (as Ryan has shown) which excludes the much needed introduction of the trust in civil law countries and which has perverted the nature of the trust, wherever attempts have been made to infiltrate it (as, for instance, in South Central America). Thus the aggregates of rules of law lead in different directions and the economic effects must differ too. To a limited extent, the security of contract as illustrated by the doctrines of frustration, *clausula rebus sic stantibus* and *imprévision* may provide another example. This result is not, however, necessary, even where the rules of positive law diverge, as von Mehren's study on causa and consideration[3] and this reviewer's article on *Protected Interests in the Law of Torts*[4] try to show.

Diversity of concepts and institutions, not their convergence, stimulate the search for their functions and effects. For this reason the various attempts to classify legal systems in groups according to their origins, which the author criticises (p. 94), serves the limited purpose of indicating the spheres where divergencies are likely to be major or minor. For, while similarity promises the ready establishment of common patterns, the modern comparative lawyer will seek to ascertain the similarity or divergence of solutions resulting from different institutions and techniques. Naturally, this cannot be expected from a comparison of extremes: the Scandinavian matrimonial property regime with its peculiar effects at the time of the death of the predeceasing spouse cannot be placed into relationship with the regime of the Mitakshara Joint Family in Hindu law. The Soviet Russian institution of contract arbitration, which stresses the interest of the State in the conclusion and maintenance of contracts is on an altogether different plane from the interference of courts in commercial contracts in Western countries, and only the *richterliche Vertragshilfe* of an embattled National-socialist Germany offers a corresponding point of departure. However, a common denominator will be found lacking: here the interest of the State in the smooth operation of the economic plan, there the hardship suffered by the creditor (which only exists if there is a contract, while the Russian interference operates also in the pre-contractual phase) provides the motive and determines the result. At the same time, practical experience shows that within certain groups of systems, contrary to the assertion of the author, the bodies of law are significantly similar in all fields of what may be called "lawyers" law. This statement does not merely express an assumption as the author believes (p. 94). Its plausibility can be tested by reference to the studies on the

3. *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 Harv. L. Rev. 1009 (1959).

4. 1963 Camb. L. J. 85.

reception of Swiss law in Turkey[5] and of English law in India.[6] These studies show that, except in the field of family law and succession, imported, imposed or copied legal systems tend to develop on similar lines. Popular reaction makes itself felt only in the sensitive areas mentioned above, and even then the force of popular opinion, as expressed in its conduct, only serves to stifle State law. In modern conditions, the *Volksgeist* does not exercise a creative force.

While comparative activities of the kind described hitherto will serve the better comprehension of the law with which the viewer is most familiar, they will also enable him to obtain an insight into the foreign system, the object of the comparison, beyond the formal structure of its rules. Intellectual curiosity and the wish for greater mutual understanding, the call for law reform, unification and international intercourse all stimulate comparative research, which may therefore be pure or impure in character. Incidentally, the author's belief (p. 45) that Gutteridge criticized unification as utopian must be rejected. Gutteridge as a founder member of the Rome Institute of Comparative Law, where he was particularly concerned with the unification of the law of sale of goods, and as an active participant in the Geneva Conference which produced a uniform European law of bills of exchange and cheques, was anxious to stress that extensive knowledge of one's own and of foreign law and its background as a whole, rather than a Benthamist approach, provides the greatest chance of success, given the resistance created by national susceptibilities and prejudices.

In its applied form, comparative law can and does fulfil practical functions, when questions of characterization arise in Private International Law, because the claim introduced into the court is presented in the light of foreign law. Examples abound; here a reference to the nature and function of consents to marry,[7] to claims by the owner of a Hungarian fideicommission,[8] or to *bona vacantia*,[9] must suffice. Closely related is the problem of transposition, substitution and adaptation of foreign law.[10] Recently the efforts of the United Nation's Economic Commission for Europe to draw up standard contracts for the sale of commodities and of machinery has led to intensive efforts to devise agreements which are both lawful and effective according to the laws of all European countries.[11]

As said before, the comparative lawyer is attracted by the diversity of concepts and institutions to search for their functions and effects in order to under-

5. 6 Annales de la Faculté de Droit d' Istanbul 1-251 (1956).
6. 8 Revista del Institute de derecho comparado de Barcelona 69-225 (1957).
7. See Dicey, Conflict of Laws 50, 235 (7th ed. 1958).
8. Betthyany v. Walford, 36 Ch. D. 269 (C. A. 1887).
9. See 1954 Camb. L. J. 22.
10. For these problems, see Lewald, Règles générales des conflicts de lois, 69 Recueil des Cours 5, 127-45 (1939).
11. *See Some Problems of Non-Performance and Force Majeure in International Contracts of Sale*, in 2 Studia Juridica Helsingiensia (1961); Benjamin, *Penalties, Liquidated Damages and Penal Clauses in Commercial Contracts: A Comparative Study of English and Continental Law*, 9 Int'l & Comp. L. Q. (1960).

stand them properly. He thus seeks to transcend the boundaries of the closed legal system as a self-sufficient unit. Common patterns may emerge, but experience puts him on guard, for he realises the complexities of unfamiliar legal systems, which often only practical contact can resolve, and which the lawyer who has this practical contact is frequently the least able to discern for the very reason of his familiarity with the working of the rules. A comparative lawyer will, therefore, have no quarrel with Professor Hall's definition of the subject for his own particular purposes and of his postulates of what comparative law should offer to the student of jurisprudence, provided that the student of jurisprudence steps down and tries his hand at it.

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