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## Comparative Law, Second Edition. By Rudolf Schlesinger.

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## BOOK REVIEWS

COMPARATIVE LAW, SECOND EDITION. By Rudolf Schlesinger. New York: The Foundation Press, Inc., 1959. Pp. xlv, 635.

The author properly refers, in his preface to this edition, to the "pioneer nature" of the first edition. For the reviewer of his book two threshold questions, therefore, arise. They are: What is the subject of comparative law? Does the book offer an adequate presentation of the subject?

Legal rules, institutions, principles, theories, and decisions, in brief, all that is included in the generic designation of "law," cannot be isolated from the specific legal system to which they belong. This system is formed by the law of a specific territorial unit which is the state. Such a system is divided into numerous fields which, in turn, deal with a great variety of subjects.

It might be a good thing to teach a specific field or subject of a foreign legal system and to include in the course comparative references to the corresponding subjects of the domestic legal system.

Certainly, a presentation of the way in which in each and every legal system any single question of any legal field is treated, would call for thousands and thousands of volumes. A university may provide for the teaching of important parts of significant foreign laws; for example, an American university may establish courses on fundamentals of the penal law of Germany or of French administrative law. Last year, this reviewer was, as a visiting professor at the University of Hamburg, Germany, teaching "American Private Law." He had, therefore, to present and to explain the principles and rules, e.g., of the law of real property, of future interests, and of trusts. Naturally, now and then in his course he referred to the entirely different approach of German law to the economic and social policy underlying the positive principle or rule in question; but this did not make his course a course on "comparative law."

What Justice Cardozo once (in "The Growth of The Law" 32) called the "difficulties and ambiguities that beset the jurists of continental Europe and have been spared us," are the very things the discussion of which illustrates a basic course on "Comparative Law." It is instruction in those fundamental institutions and ideas deeply imbedded in foreign legal systems, which essentially differ from their counterparts in the law at home with which the students are presumably familiar. (A-rebuttable presumption indeed!)

In other words, such a course will, above all, offer a discussion on foreign fundamentals under a comparative aspect. Measured by this test, the author's book presents one of the most important tools for a course on comparative law.

Among the fundamentals mentioned *supra*, legal education must be mentioned first, as the book, of course, demonstrates. How does a person become a

lawyer? How does a lawyer qualify for becoming a teacher of law at a university? The Anglo-American approach to these topics is essentially different from that in the old countries. The author devotes also substantial space to the proof of foreign law. Also this is a subject of comparative law because not the proof of a specific foreign law, but the general approach to the proof of foreign law must be studied.

Great attention has also been given by the author to a comparison between common law and what has been called civil law. Professor Schlesinger has undertaken this difficult task in both directions, the procedural and the substantive ones. In the book, more than two hundred pages make up this part which, in my view, is the *primus inter pares*—the best among the best ones.

It is a very accurate and yet very amusing way in which the author presents this subject. He does it in the form of a dialogue between legal experts whose names are fictitious, and yet indicative of their background: These are "Professor Comparovitch" and his opposite members, Mr. Edge and Mr. Smooth, two outstanding practitioners. Their discussion sheds a bright light on the principal differences between civil procedure (including jurisdiction) in the Anglo-Saxon part of the globe on the one hand, and in that part thereof which one may call the civil law section, on the other.

The conversation between the experts is not restricted to civil procedure in the narrow sense. It extends to the very important question of evidence and even to the positions of counsel and lawyers' fees, with side glances on the problem of contingent fees. Furthermore, also topics such as legal aid and arbitration are not overlooked.

The judicial organization in many foreign countries embraces not only commercial courts, labor courts, and tribunals dealing with matters of social insurance, but also administrative courts. The main features of administrative law as it is treated in the most important legal systems are discussed and this includes the question of governmental liability.

In many foreign countries a particular "commercial law" has been codified in commercial codes. In addition, as the author states, demarcation of what is "commercial" and what is "noncommercial" has become a matter of central importance in most civilian systems. A short but very precise examination introduces the reader into the very difficult subject. Professor Schlesinger points also to the significance of the "commercial register" which exists in almost all civil law countries; even in those among them which do not have a separate commercial code.

The differences in the approaches to statutory interpretation have been taken into consideration in the book. The same is true of the influence of "precedents." The word "jurisprudence" of the French legal language signifies the importance of precedents in French law. At this point, it may be added

that this very term would supply another example of the illustrations offered by the author for the language difficulties as a "prolific source of confusion."

A noted French writer speaks, in one of his recent articles, of a certain concept which "is applicable to French '*jurisprudence*'." A superficial reader might translate the last word as jurisprudence (in our sense). But the French writer, of course, used the word in the French sense and the meaning there is "the constant course taken by French courts as to a specific legal concept or rule."

If a reader of this review had the impression that the book does not offer a few specific subjects as object lessons for comparative law, that impression would be wrong. Important aspects of the law of agency, corporations, and conflict of laws are presented.

Also a few of the fundamental ideas guiding the civil courts in many regards are pithily discussed. These are the "general clauses," the *contra-bonos-mores* formula, the abuse-of-rights theories and the principles of "publicity" in both the transfer of land and transactions not relating to land.

Naturally, the answer to the question of which among various doctrines is more characteristic of a foreign system than another depends on an individual judgment. This reviewer would suggest that the next edition might include a discussion of the different approaches of the various laws dealing with succession. Many foreign legal systems have adopted the idea of "universal succession" which is completely alien to the Anglo-American "decedents estate law." Furthermore, a student of long standing of Roman Law and English equity might find that the author underestimates the influence of Roman law on modern civil law and overestimates a little the influence of Roman law on the development of English equity.

References to "comparative" monographs and articles in English are an invaluable aid for students of comparative law in the Anglo-Saxon countries. Throughout the book bibliographic notes accompany the text. In addition, there is an appendix of considerable size presenting good information of the growing comparative literature in English. Far from claiming many gaps, either in number or in type, the reviewer would say that there are almost none. Two publications which fall within the type of books (and not of mere articles) supplying comparative studies in very important fields, are not mentioned in the book. This is, on the one hand, the "Studies in Federalism" edited by Bowie & Friedrich (1954). The book presents a penetrating comparison of such significant features as legislation, executive power, taxing power, personal rights, and judicial organization in Australia, Canada, Germany, Switzerland, and the United States. The other book is "Labor Relations and The Law" (R. E. Mathews, Editor in Charge, 1953). Interesting enough, the latter was not only mentioned, but also presented, in the first edition (p. 150),

as an illustration for the use of the comparative method in important fields. It was this comparative-law feature which induced Dr. Karl Wahle, President of the Austrian Supreme Court, who reviewed it in an Austrian legal periodical, to emphasize that, with respect to its comparative-law part, it has no rival among the European literature on labor law.

There cannot be the slightest doubt that Professor Schlesinger provides teachers and students of comparative law with a book which deserves highest commendation. The first edition was highly appraised. The second edition is even an improvement on the first one. Finally, one more among the numerous outstanding features of the book must be mentioned because it distinguishes it from other legal books published in this country: its index is superb.

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CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE. By Rollin M. Perkins. New York: The Foundation Press, Inc., 1959. Pp. xxxv, 851.

I suppose the reason most casebooks are "born" is that the author believes that he can do better than someone else, or more likely that the casebooks available in a specific course are not adequate for the method of teaching that he wants to employ. With this in mind, the following review has been written.

The book's main advantage is that it is readily suitable to almost every criminal law course taught in the law schools of the United States. It has some 753 pages of cases and material (including a 30-page appendix) treating the substantive criminal law, and 233 pages dealing with the procedural and enforcement aspects of the criminal law. Thus the usual three hour course in the substantive law can be carved from the first part, and a two hour Criminal Procedure course can be easily taught from the second part of the book. If one teaches in a school which would allow a six hour course in Criminal Law and Procedure, there is sufficient material to accommodate such a fortunate individual.

The author starts out with a chapter on Definitions and Classifications which is not found in many casebooks and certainly is an apt beginning for the freshman law student. It would seem, however, that the introductory chapter could go farther with historical development and purposes of criminal law.

One of the outstanding features of this book is the excellent treatment of "corpus delicti," which helps the student not only in criminal homicide, but all crimes. This, together with Professor Perkins' "man-endangering-state-of-