THE TEACHING OF COMPARATIVE JURISPRUDENCE.

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The crowding of the LL.B. course and the increasing pressure of professional requirements make it more and more difficult to maintain a proper balance between the more technical aspects of legal education and those subjects which give a deeper intellectual and cultural background to the future lawyer. Law teaching in Melbourne has on the whole shown a healthy and welcome resistance to any tendencies to reduce the teaching of law to a purely technical and professional matter. This is not only wise from a wide educational aspect. It is also good sense from the point of view of the legal profession. The great lawyers of past and present days have never been the pure technicians. The history of the British American and Australian Benches shows what outstanding share in legal development has fallen to those judges whose outlook and training has reached beyond the purely professional aspects of the law into the fields of political science, economics, sociology, international affairs, natural science, or other branches of human knowledge. There will always be some who regard the teaching of Jurisprudence as a waste of time to the lawyer, but it is not on the whole the greater lights of the legal profession who think so. Those who believe that Jurisprudence is superfluous are usually the people who, whether on the Bench, in the academic profession or in other branches of law, disguise their inarticulate prejudices under seemingly technical propositions. Any apparently theoretical and academic subject, taught properly, is at the same time a contribution to practical knowledge.

It is in this respect that the teaching of Comparative Jurisprudence could make an important contribution to the linking of the wider cultural and sociological aspects of law with technical legal training. In the new syllabus for the Melbourne LL.B. course, Comparative Law will take the place of Roman Law, as an alternative subject to Public International Law. The disappearance of Roman Law will not meet with universal approval. The change is not due to any lessening of respect for the outstanding contribution which the teaching of Roman Law can make to the training of the legal mind. But it is time to cut out the dead wood and to save from the teaching of Roman Law that which is most valuable to the modern law student. Except for the legal historian there is little value in the teaching of many parts of the system of Roman Law as distinct from the general legal principles on which it is built. There is little point for example in the teaching of the different forms of contract as they have developed in the history of Roman law, while there is still great value in the teaching of the basic concepts of contract, delict, quasi-contract, *negotiorum gestio*, possession etc. Much of what is most valuable in the teaching of Roman Law has however now passed into analytical Jurisprudence. Many of its other most important and lasting features have passed into modern Continental systems of law, with greater or lesser modifications. Finally, the adequate teaching of Roman Law is greatly hampered by the decreasing proportion of law students

equipped with an adequate knowledge of Latin. The study of Roman Law without Latin is bound to be a somewhat sad and second-hand affair. The decline of Latin is deplorable but incontestable in Europe, and even more so in Australia.

An introductory study of some fundamental aspects of Roman Jurisprudence and legal development, coupled with a comparative study of modern Continental and Anglo-American legal systems, should preserve what is most valuable in the teaching of Roman Law, while adding many new features of both theoretical and practical interest. The main advantages of such a course can be briefly classified as follows:

(1) A comparative knowledge of Anglo-American and Continental legal concepts is quite frequently indispensable to the solution of legal cases, notably of course in the field of private international law. A famous example is *In re Berchtold*[1] where the question arose whether a devolution of the property of an intestate owner of English land domiciled in Hungary was to be governed by the *lex domicilii* or the *lex situs*. This depended on whether the land was to be treated as movable or immovable. This distinction however does not exist in English law which has a similar but not identical distinction between realty and personalty. The Court decided that the rights of the deceased owner had to be classified as rights over immovable property although they were personalty, and that they were therefore subject to English law as the *lex situs*. Many other cases where the comparative classification of Continental and English legal concepts is necessary will be found in the text-books on Private International Law, notably in the chapters on classification.

(2) An important source of Public International Law is the application of the "general principles of law recognised by civilized nations" (cf. *Article* 38: *Statute of the International Court of Justice*). The International Court of Justice, or any other institution called upon to decide problems of international law—such as the Mixed Arbitral Tribunals created after the First World War for the settlement of certain reparation claims—must often have recourse to Comparative Law in order to decide whether certain principles of law are genuinely recognised among nations. Among the numerous questions which have arisen in this connection are the problems of unjust enrichment, estoppel, abuse of rights, and liability for damages without fault. Each of these raises important problems of Comparative Law. Unjust enrichment, for example, is specifically regulated in most Continental civil codes, but it is not an established notion of English law. Yet a closer study of the latter system shows the increasing recognition of the principle, mainly through the various quasi-contractual actions (money had and received) and through certain equitable remedies (following property through, con-

1. [1923] 1 Ch. 192.

structive trust etc.). In American law recognition has gone further, and unjust enrichment occupies an important place in the unofficial but authoritative *Restatement of American Law*. Abuse of rights is not as such known in English law.[2] The principle is, with greater or lesser definitiveness, contained in several modern Continental Codes such as the German and Swiss Civil Codes, and it has been judicially recognized in France. Some modern English decisions also show a certain tendency towards the recognition of such a principle.[3] Here again is ample material for further study. The principle of estoppel seems at first sight a specifically Anglo-American legal notion without parallel in other systems, yet the *exceptio doli* of Roman Law, recognised in several Continental systems, offers a close parallel. The conditions under which a contract may be discharged without breach, studied in English law under the problem of " frustration of contract," also finds interesting parallels in modern Continental laws.

(3) A comparison of legal concepts and categories leads to the wider sociological aspect of the study of Comparative Law which is one of the most vital contributions that it can make to the general education of the lawyer. Nowhere has this aspect of a comparative study of legal institutions been shown more brilliantly and concisely than in some of Maitland's work. In his essay on *Trust and Corporation*, Maitland showed more than the difference between the use of a special form of the legal personality (*Stiftung*) in German law and the use of the English trust for similar purposes in English law. He showed that behind this apparently technical difference there were deep sociological contrasts: the English distrust of incorporated form and its preference for the use of personal relationships under judicial control; the social preference for moral personality as against legal personality; on the other hand, the German preference for abstract categories; the almost mystical concept of a perpetual legal institution which would survive changing administrators and incorporators. A parallel to this German concept can be found in the Frenchman Hauriou's theory of the "*institution.*" A vast field of further studies along the lines shown by Maitland awaits the jurist and sociologist, and such studies will be of far more than purely theoretical and legal importance.

(4) Between the two World Wars the comparative study of law was particularly important for the preparation of international codifications on certain subject-matters. This is however far more than a matter of mere comparison of concepts and paragraphs. Legal concepts and institutions have to be studied in their whole background and function. It is only

2. *Mayor of Bradford v. Pickles*, [1895] A.C. 587.
3. Cf. for example *Hollywood Silver Fox Farm v. Emmett*, [1936] 2 K.B. 468.

such a study which will discover similarities between trust and legal personality which have analytically nothing in common, or on the other hand vital differences between the legal concept and function of merger in different systems of law, although the name may be identical. This alone will also make it possible to decide certain problems of public policy. But the application of a foreign law is generally subject to the overriding concept of public policy (*ordre public*). Many questions have arisen before English courts whether a Mormon, a Hindu, a Moslem, or a Soviet marriage can be regarded as a marriage in a sense compatible with the principles of English public policy.[4]

To sum up : an intelligent study of Comparative Law should achieve three complementary purposes. In the first place, it should sharpen the analytical capacities of the lawyer by training him to evaluate the similarities and differences in the legal concepts of different systems. In the second place, it should help the lawyer directly in the solution of practical cases, limited in number but usually outstanding in importance, where the comparative evolution of legal notions of different systems is necessary. In the third place, it should teach the lawyer to break out of the artificial isolation of the law. Anyone who has intelligently studied Comparative Law will cease to regard law as something entirely self-contained and will begin to understand its social function and purpose. Above all—and this is not the least important of the advantages of such a study—a training in Comparative Law will break down a narrow nationalism. It will teach the lawyer that nations struggle towards the achievement of a satisfactory community and way of life by different means. Never has there been a more widespread and a more nauseating tendency to exalt national achievements as against those of other nations than at present. It is a fatal obstacle to international understanding and collaboration. It is only by a sensible and knowledgeable blend of the needs of international regulation and authority with the recognition of the differences of national ways of life—which express themselves in laws —that we can hope to achieve progress and sanity.

4. Cf. Cheshire, *Private International Law* (3rd edition), Chapter XII.