

THE TEACHING OF COMPARATIVE LAW

An Innovation at the University of Melbourne ¹

Professional requirements reduce the number of subjects which link legal education with wider educational and cultural perspectives. It is submitted that a course on Comparative Jurisprudence would be of substantial help in providing such a link. Such a course could take the place of the present subject of Roman Law; this substitution will take place in the University of Melbourne from the commencement of 1949. The main value of Roman Law for the contemporary student has always been the teaching of fundamental concepts as developed in a system of great logical power and jurisprudential value. But he can derive but little profit from the details of Roman Law such as the different forms of contract, which are largely a matter of historical development without any intrinsic juristic value.

The main value of Roman Law teaching can, however, be preserved by transforming it into an introductory study of civil law concepts without the many cumbersome details of the classical Roman legal system. In its place, a comparative study of the vital aspects of modern continental jurisprudence, seen in relation to the Anglo-American system, should be both more interesting and more valuable to the modern student. The value is a twofold one: For the purpose of technical legal education and analytical jurisprudence, a comparative study of Anglo-American and romanistic continental institutions should be of great assistance to the understanding of both. Among many other examples I would mention the distinction between movables and immovables as compared with that between real and personal property, or the comparison of the concept and function of the trust with that of the *Anstalt* or *Stiftung* which greatly increases the understanding of the legal institutions and purposes both of the trust and of corporate personality. This leads to the second and wider use of the teaching of Comparative Law. As Maitland has shown, in his *Selected Essays on Trusts and Corporate Personality*, there is behind the use of different legal concepts a deep sociological and philosophical significance. Many vital differences between the English and the German way of thinking, for example, can be illuminated by the comparison between the trust and the *Stiftung*. The teaching of Comparative Law can show to an advanced student

¹ This article is based on a paper read by the author to the third Annual Conference of the Australian Universities Law Schools Association held at Adelaide in August, 1948.

the relativity of his own legal thinking and education. This is an essential part of an enlightened legal education.

Another aspect, of both practical and theoretical significance, is a study of the function and development of public law in the leading continental systems on the one hand and in the Anglo-American on the other. A study of continental administrative law is now almost indispensable for an understanding of the recent growth of public law in the English legal system. The importance of an understanding of foreign legal institutions to the student of Private International Law goes without saying. To the student of Public International Law, too, it is important, for the development of Public International Law will largely depend on the application of those "general principles of law recognised among civilized nations" which are one of the sources of law for the International Court of Justice.

A course on Comparative Law should be not only analytical but functional. It should show the social use to which legal concepts are put in different legal systems, and it should show how different legal systems may arrive at the same social objectives by different means. In my study of legal theory I have always been impressed by the amazing parallelity of legal ideas in the different systems where similar social influences work, despite the multitude of technical legal differences.

There remains a technical question. What is the minimum equipment necessary for the teaching of Comparative Law? Not many Universities in Australia will have teachers available with a first-hand knowledge of both the English and a continental legal system. However, a good knowledge of Roman Law should enable any experienced teacher of English law to undertake such a course, provided that he supplements his knowledge with the ample material now available in certain topics of Comparative Law; the Journal of Comparative Legislation, for example, has published a series of comparative studies on frustration of contract.

The short syllabus of the course planned for 1949 at the University of Melbourne is appended, together with a tentative reading list.

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Appendix

Comparative Law: A course of two lectures weekly throughout the year.

Syllabus :

- (1) Purpose and method of study of comparative law.
- (2) Foundations of Roman Jurisprudence and its influence on modern legal systems; in particular, a comparison of the development of Roman Law on the continent and in England.
- (3) General comparison of Anglo-American and continental legal systems.
- (4) Selected problems of modern comparative law (public and private law; code law and case law; legal concepts in different systems.)
- (5) Special subject for 1949: Frustration of contract in Roman, continental, English, and International Law.

Books :

- (a) Recommended for preliminary reading:
 - Bryce, *Studies in History and Jurisprudence*, Vol. II.
 - Macintosh, *Roman Law in Modern Practice* (*Green & Son*, 1934)
 - Hunter's *Introduction to Roman Law*, 9th edition (*Sweet & Maxwell Ltd.*, 1934.)
- (b) Prescribed textbook:
 - Gutteridge, *Comparative Law* (*Cambridge University Press*, 1946).
- (c) Recommended for reference:
 - Buckland and McNair, *Roman Law and Common Law* (*Cambridge University Press*, 1936.)
 - Friedmann, *Legal Theory* (2nd edition; *Stevens & Sons Ltd.*, 1948.)
 - Goldschmidt, *English Law from the Foreign Standpoint* (*Pitman*, 1947.)
 - Holdsworth, *History of English Law*, Vol. IV, pp. 217-293 (*Methuen*, 1924.)
 - Maitland, *Selected Essays*, Vols. II and V.