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CASES — TEXT — MATERIALS

SCHLESINGER'S

COMPARATIVE LAW

SEVENTH EDITION

by

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2. COMPARATIVE LAW AND NEIGHBORING DISCIPLINES: THEORY AND PRACTICE

Unlike most other subjects in the law school curriculum, comparative law is not a body of rules and principles limited by a jurisdictional scope. It is not part of the "positive law", governing a particular territory or geographic area. To clarify, talking about California, German or Peruvian contract law, tort law, criminal law or labor law, conveys the sense of a body of rules and principles *as applied* in those geographic areas. To talk about California or German or Peruvian comparative law does not convey the same meaning. If anything at all, German comparative law means only the way in which some lawyers in Germany do comparative legal work as scholars, teachers or practitioners.[1] Much more frequently, a geographic attribute is not attached nor makes sense referred to the label comparative law. Comparative law is a cosmopolitan discipline, with the very same subject matter, if taught in Bangalore, New York, Paris or Brazzaville.

Comparative law is a body of potentially "universal" knowledge about the law, acquired by observing the legal phenomenon as it appears in a variety of social and geographic contexts. It is an approach to legal institutions or to entire legal systems that study them in comparison with other institutions or legal systems as they exist elsewhere. In this sense comparative law allows us to study *the law* as a phenomenon of social organization that, as language, fashion, culture or religion, shows differences, sometimes very acute, or analogies, sometimes striking, in different geographic settings. In this respect, the term comparative law is a misnomer. It would be more accurate to speak of Comparison of Laws and Legal Systems. However, by the force of tradition, the term comparative law has become the accepted title of our subject.[2]

1. See the Oxford Handbook of Comparative Law, Zimmermann & Reimann, Eds. (2006), containing entries on national traditions of comparative law. For example, Benedicté Fauvarque-Cosson, "Development of Comparative Law in France," Ingeborg Schwenzer, "Development of Comparative Law in Germany, Switzerland, and Austria," Elisabetta Grande, "Development of Comparative Law in Italy," John W. Cairns, "Development of Comparative Law in Great Britain," etc.

2. Its counterpart in French is droit comparé ("law compared"); in German, Rechtsvergleichung ("comparison of laws"). The German term has been criticized as too exclusively method-oriented; likewise, the statement that comparative law is primarily a method or way of looking at law has been criticized as implying that comparative law lacks meaningful substantive content. But "comparison" would seem to denote both the process, or method, of comparing laws and legal systems and the body of insights and knowledge acquired through that process.

(a) Comparative Law, Conflict of Laws, and International Law

In today's close-knit world, the practicing lawyer finds to an ever-increasing extent that local as well as foreign clients are faced with problems that cut across national boundaries and the legal systems of more than one country. In metropolitan centers, matters of this kind have long been "part of the daily legal fare."[1] What may be less generally appreciated is the fact that, through the American operations of foreign concerns and the increasing involvement in international trade of medium-and small-sized American firms located in every part of the country, outlandish problems are carried into the offices of countless practitioners far from the big cities. Similarly, in dealing with the estates and domestic relations of foreign-born individuals and of United States citizens permanently residing abroad, practitioners in every community encounter problems of foreign and international law.[2] International travel by millions of Americans further adds to the growing volume of such transnational legal problems.

In handling these problems, a lawyer must, first of all, know the internal law of his or her own state or country. In addition, the lawyer will have to have some familiarity with the more specialized, internationally oriented subjects. Traditionally, these subjects are grouped under four headings: international Law, conflict of laws,[3] foreign law and comparative law.[4] From a functional point of view, it might be argued that all of these subjects should be considered together.[5] But merging them would create a unit much too large to be convenient for the teacher or textbook writer; hence, as a rule, they continue to be presented separately.[6] In order to

1. Arthur H. Dean, "The Role of International Law in a Metropolitan Practice," 103 Univ. Pa. L. Rev. 886, 888 (1955).

2. See Schlesinger, Book Review, 41 Cornell L.Q. 527 (1956).

3. In the present context, the emphasis is on international rather than interstate conflicts. The term conflict of laws thus is used in the sense in which the civilians speak of private international law and international law of procedure.

4. From the standpoint of an American practitioner faced with legal problems arising from international transactions, the term comparative law, as used in the text, may be defined as the body of knowledge and techniques that one has to assimilate in order to deal successfully with the foreign law elements of such problems.

For some purposes it may be proper and indeed necessary to distinguish between comparative law and foreign law. But from the point of view of one who aims to handle actual legal problems presenting foreign aspects, the distinction has little utility: comparative law, or the comparative method, can be learned and practiced only by dealing with foreign legal materials; while learning and understanding foreign law inevitably involves drawing comparisons with the law with which one already is familiar.

5. The term "International Legal Studies" has been used to designate integrated programs of research and instruction which cover or cut across all three traditional subjects. See J. B. Howard, International Legal Studies, 26 U. Chi. L. Rev. 577 (1959).

6. Needless to say, each of the three traditional subjects can be subdivided in various ways. Moreover, books and courses intended to perform more specialized functions increasingly combine selected elements of all three subjects in exploring such areas as international and regional organizations, international business transactions, or the legal aspects of development. See, e.g. M. Katz, "The International Education Act of 1966: The Place of Law and the Law Schools", 20 J. Legal Educ. 201, 204–5 (1967). See also Horatia Muir Watt—in Reimann and Zimmermann, eds., Oxford Handbook of Comparative Law, Oxford University Press (2006)

understand the organization of law school curricula, library collections, and the pertinent literature, it becomes necessary, therefore, to know approximately where the lines of demarcation are drawn between international law, conflict of laws, foreign law and comparative law.

In theory comparative law is clearly distinguishable from other branches of the law that make an international curriculum. Comparative law is different from public international law, since international law is the body of *positive law* (customary or based on treatises) governing the relationship between sovereign states or international organizations (which today are much more numerous than the roughly 200 currently existing states). Comparative law is different from private international law, (also known as conflict of laws, or choice of law), again for the *positive* nature of this body of law. Indeed, you can compare Private international law—a body of domestic law dealing with fact situations with some of their elements located abroad—as it is in France or in England as much as you can compare English or French property or criminal law. Nor should comparative law be confused with foreign law. A law review article written by an American author dealing with the law of intellectual property in China is not a piece of comparative law since it does not compare two or more entities on equal footing, but only describes a foreign system at most "translating" it into a language and into legal categories understandable domestically. These distinctions should not be taken rigidly however.

One thing that the student should learn by comparing the law is a high degree of cultural relativism, a very deep skepticism towards legal dogmatism, and a humble inquisitive attitude aimed at understanding by keeping a distance from his object of observation. Law schools usually frame the brain of students to communicate as national lawyers with other lawyers with the same training. The result is that for a lawyer trained in one legal system the conceptual difference between a "trust" and "agency" that between "contract" and "tort" or between "felony" and "misdemeanor", is as natural and real as that between a dog and a television set. By comparative study one sees how these notions are contingent, local and culturally constructed. A gift, for example, is not a contract for lack of consideration in the common law, while it is a *contrat* in French law. Marriage is a *contrat* in France but it is not a *contratto* in Italy and so on.[7] The same conceptual skepticism should be applied also when one differentiates comparative law from neighboring disciplines.

7. The definition of contract offered by the Italian Civil Code is the following: Art. 1321 "Contract is an agreement between two or more parties to establish regulate or extinguish between them a patrimonial legal relationship." (emphasis added). Because the essence of a marriage is not considered "patrimonial" in Italian law, marriage is consequently not a contract. See Alberto Musy and Alberto Monti, The Law of Contracts, in Jeffrey Lena & Ugo Mattei (Eds.), An Introduction to Italian Law (2001).

Mathias Reimann, Beyond National Systems: A Comparative Law for the International Age

75 Tulane L. Rev. 1103, 1103–1108 (2001).

Meeting for the centennial of the Paris Congress of 1900, widely considered the birth hour of modern comparative law, is a welcome occasion to celebrate our discipline's past accomplishments as well as its current revival in many parts of the world.[1] More importantly, however, it provides an opportunity to reflect upon the difficulties and problems that beset the field. The most widespread concern is, perhaps, that in most places in the world, comparative law does not play nearly as prominent a role in legal academia and practice as befits our age of globalization (real or perceived). Comparative law should occupy a central place in an environment in which trans-boundary issues have become routine. However, all too often, our discipline "fail[s] to excite the imagination of students and practicing lawyers."[2]

. . .

In order to understand how our discipline has come to lag behind twentieth-century developments, we must recall some of its history.[3] Comparative law was not, of course, invented at the Paris Congress. It had existed for hundreds of years, although it was not called comparative law (droit comparé, Rechtsvergleichung, diritto comparato, or the like) before the nineteenth century. At least since the Middle Ages, jurists had compared an extraordinary variety of legal rules and systems: Roman and canon law, droit ecrit and droit coutumier, tribal and feudal regimes, biblical commands and natural law precepts, among others. To this, the late nineteenth century added an ethnic dimension by comparing whole legal cultures from a historical and worldwide perspective.[4]

In contrast to this richness, the concept of comparative law that the Paris Congress bequeathed to the twentieth century was extremely narrow. Its lodestar was the science of a "droit commun legislatif."[5] This meant, essentially, the comparison of the private law codes and statutes of continental European countries with the purpose of legal harmonization and

1. Comparative law has recently become prominent in Western Europe in the context of the Europeanization of private law. The discipline has also experienced somewhat of a revival in the United States as demonstrated by the proliferation of teaching materials, specialized journals, and other literature about the field. Of course, comparative studies are well established in many other parts of the world, such as Japan, Korea, Israel, and South Africa.

2. Basil Markesinis, "Comparative Law—A Subject in Search of an Audience", 53 Mod. L. Rev. 1, 1 (1990).

3. For an overview of the developments until the nineteenth century, see Walther Hug, The History of Comparative Law, 45 Harv. L. Rev. 1027 (1932). More recently, Mathias Reimann & Reinhard Zimmermann, eds. The Oxford Handbook of Comparative Law, Oxford University Press (2006).

4. See K. Zweigert & H. Kötz, An Introduction to Comparative Law 1–12 (Tony Weir trans., 2d ed. 1987; one-volume paperbound ed. 1992) at 57–58.

5. See *id.* at 61.

unification.[6] Most importantly in our present context, it meant reducing the discipline to the comparison of national legal systems.

At the time, this seemed obvious and was quite appropriate. After all, there simply were no other legal regimes that seemed to matter (anymore). Feudal and tribal rules were legal history. Roman law and indigenous customs had just been rendered obsolete by the great codifications. Canon law had lost most of its force in the modern secular state. Distant religious or customary regimes were far beyond the orbit of the dominant Eurocentric approach.[7] Public international law operated somewhere at the outer margins of the legal universe and played a very limited role in practice. In short, in the age of the modern state with its monopoly on lawmaking and enforcement, the law of the civilized world consisted exclusively of the laws of sovereign nations, such as France, Germany, or Italy. At the time, this seemed almost too obvious to mention.[8] Thus was born the traditional concept of twentieth-century comparative law: it meant the study of national legal systems, their laws, and virtually nothing else. . . .

Needless to say, the legal universe changed in the twentieth century, especially in its last few decades.

In the second half of the twentieth century, we witnessed the rise of numerous legal systems outside of, and above, the national ones. Since the founding of the United Nations, international law has developed into a complex legal regime with rulemaking bodies, a multitude of written provisions, a court, and enforcement mechanisms, however effective or ineffective. Several international trade regimes were created. On a global level, the General Agreement on Tariffs and Trade (GATT) and the WTO were formed; on a regional level, the European Economic Community (now the EU) and the North American Free Trade Agreement (NAFTA) were established; others, like the Common Market of the South (MERCOSUR), are now emerging. In the area of private law and litigation, international conventions of all sorts have proliferated under the auspices of the Hague Conference of Private International Law, the United Nations Commission on International Trade Law (UNCITRAL), or the European Community and pertain, inter alia, to the sale of goods, choice of law, procedural matters—such as service of process, taking of evidence, and jurisdiction and judgments—and arbitration. Human rights systems have also developed, again, in both a worldwide and a regional, especially European, context. In addition, there are several unofficial codifications of substantive law in the international sphere that have lately enjoyed much attention, especially the

6. We must not forget, however, that the intellectual horizon of the major participants was by no means so narrow. Édouard Lambert displayed a very broad and highly sophisticated view of comparative law and all its then-current ramifications. See Congrès International de Droit Comparé, Procès-Verbaux des Séances et Documents 26–61 (1st ed. 1905).

7. All participants in the Paris Congress were Europeans. See 2 Congrès International de Droit Comparé, Procès-Verbaux des Séances et Documents 609–21 (2d ed. 1907).

8. The whole proceedings are imbued with the understanding that the law to be compared has to be the positive law of modern nation-states.

UNIDROIT Principles[9] and the Principles of European Contract Law.[10] Perhaps the most striking of all these developments is that the countries of Western Europe have recently formed a political union with standardized passports, common policies, a common currency, and other common elements. More than any of the other changes, the EU demonstrates that, today, national legal systems are no longer alone in the legal universe. They coexist with regimes operating on the supra- or international level.

Through these transnational regimes, national legal systems have become interconnected in manifold ways. They are subject to, and modified by, international treaties and conventions, trade regulations, and European directives. Some countries harmonize their laws or promise to recognize each other's judgments. Others cooperate in antitrust enforcement and coordinate their fiscal policies. Consequently, countries have suffered a curtailment of sovereignty, ranging from mild, as in the case of the United States, to severe, as in the case of the members of the European Union. It is true that the nation-state has survived and that the news of its death is greatly exaggerated. But it is also true that the nation-states' legal systems are no longer nearly as separate and independent as they were in 1900.[11]

In addition, the internationalization of the economy has entailed the growth of large-scale legal practice on the international level. This was fueled by, but would probably have occurred even without, the rise of transnational law regimes. Today, there are innumerable firms, clients, transactions, and disputes that are international in the sense that their geographic location hardly matters anymore. As a result, there is a world of commercial law practice, i.e., of counseling, negotiating, drafting, and arbitration, that is operating on its own terms and becoming increasingly independent from national systems.

Of course, not nearly all law and legal practice has developed in this direction. In fact, vast areas have remained untouched by internationalizing trends. But in the trans-boundary context, the very area with which comparative law is concerned, these trends are broad and strong, and they continue to gather momentum....

How is comparative law dealing with these developments as we meet in New Orleans in the year 2000? The short answer is, so far, not well. Its mainstream still clings to the nationalistic concept underlying the Paris Congress....

9. Int'l Inst. for the Unification of Private Law, Principles of International Commercial Contracts (1994). For an explanation, see Michael Joachim Bonell, "The UNIDROIT Principles of International Commercial Contracts: Why? What? How?" 69 Tul. L. Rev. 1121, 1121–47 (1995).

10. Ole Lando & Hugh Beale eds., Comm'n of European Contract Law, Principles of European Contract Law: Parts I and II (2000).

11. For example, in France, more than half of the legislative measures taken in 1991 (1564 out of 2981) emanated from Brussels, and in The Netherlands, roughly thirty percent of all recent legislation serves to implement European Community directives. See G. Federico Mancini, "Europe: The Case for Statehood", 4 Eur. L. J. 29, 40 (1998).

Serious efforts to integrate transnational law fully into our discipline are nowhere in sight, at least as far as I can see.[12] Even where international regimes are considered, they are normally treated merely as an addendum to the well-known materials about nation-states and legal families. In summary, transnational law is out there, somewhere on the periphery of our vision. We cast it an occasional glance, but we do not consider its study a necessary part of our job.

12. Because I have not looked at every book and article on comparative law recently published in the world, I may be overlooking something. If so, I would be glad to be proven (at least partially) wrong in my description of the current situation. I recognize that outside the traditional comparative law camp there are some efforts at integrating transnational material into specific comparative studies.