

BOOK REVIEWS

RUDOLF SCHLESINGER, *COMPARATIVE LAW — CASES — TEXT — MATERIALS*.
2nd ed. (1960) [London, Stevens & Sons Ltd. — The Library of
World Affairs, 635 pp., incl. Appendixes and indexes, £4.4.0d.]

That Professor Schlesinger's book is an important and authoritative work can hardly be doubted. The book is a most informative source for the comparative lawyer and would supply him with interesting and illuminating materials.

The primary object of the book is to enable the Common Law practitioner to understand modern civil law systems with which he frequently comes into contact. The author, however, does not purport to give a full account of modern civil law systems. He only wishes to acquaint the American attorney with the elementary principles of civil law and its spirit so as to enable him to understand an opinion or letter of a foreign lawyer.

The book includes three parts: A) The Nature of a Foreign Law Problem; B) Common Law and Civil Law—Comparison of Methods and Sources and C) A Topical Approach to Civil Law. In the first two parts the author intends to show the standing of a foreign law problem in the American Courts and to set out the elements of modern civil law. In the third part he offers a more elaborate discussion of three selected topics of civil law. He thus attempts to give the practitioner a deeper insight into modern civil law.

One method of writing is employed in all three parts of the book. The author reprints—with slight alterations and corrections—French, German and Swiss as well as English and American cases articles and passages from textbooks. These are supplemented with the author's notes, footnotes and occasional additions. There is no doubt that the author's attempt to introduce comparative law through foreign cases and materials has much to be said in its favour. Yet, there are certain drawbacks. In the first place the frequent changes of style which follow from the incorporation, side by side, of various materials of different systems, renders reading difficult. Secondly, the different materials are often only remotely connected with each other. It is therefore, sometimes, not too easy to follow the author and to get a clear picture. Nevertheless, one can well argue that the importance of the inclusion of the foreign law materials would overrule these reflections.

The author, however, includes numerous American cases, as well as English and American materials. It is hard to see why these should be treated as more authoritative than the author's own opinions about civil and comparative law.

The incorporation of American cases in particular, seems with respect, cumbersome. Only few of the included judgments deal mainly with the point that the author wishes to illustrate through them. Too often the reader has to struggle through numerous pages before arriving at the main point in question. Thus in order to illustrate the distinction between common law and civil law the learned author cites the decision of Malcolm J. in *Re Shoop* (1930) 41 Phil. 213. This case concerns the application of common and civil law in the Philippines. Out of the

thirteen pages of the case—printed on pp. 152-165—only pp. 158-159 deal with the distinction between common law and civil law. The other pages report the application of Spanish statutory law and the application of common law in the Philippines. Moreover, the learned author points out that the distinction between common law and statute law suggested by Malcolm J. is inaccurate. A brief statement of the learned author would, certainly, be far more illuminating.

Several texts brought forward by the author, too, are inaccurate or outdated. Accordingly, the learned author has to add corrections in footnotes. Accordingly the reader has to divide his intention and must check the correctness of the text through the footnotes. Thus, the "Tools of the Trade", *i.e.* the main French and German Law books and law reports, are introduced by an extract from the 1949 edition of Professor Gutteridge's *Comparative Law*. Post 1949 authorities are supplemented in the text in square brackets and numerous footnotes. It is hard to see why the reader is supposed to derive more benefit from such corrected text than from an accurate account by the learned author.

The system employed by the author leaves the impression that the book is rather a piece work than a unity. It might have been more readable if the first two parts were written by the learned author. The third part alone would then constitute the case-book part and would be a companion to the first text-book like, shorter, general parts.

One other general remark must be made. The author incorporated far more German and Swiss materials than French ones. He points out in the introduction that the formal judgments of the French courts are so different from English or American decisions that the common law practitioner could hardly cope with them. This is a strong argument, though one might have thought that the very difference warranted illustration. Moreover the author's contention hardly explains why it was impossible to include notes from Dalloz or Sirey or an adequate number of extracts from French law books or articles. The third chapter of Part B will show how far French materials are outbalanced. In the first section of this chapter, besides quotations of the relevant sections of the codes, the learned author incorporated two German decisions and a passage from a German law book. No French material is introduced. In the second section of this chapter, two German decisions, but no French material, was printed. In the third section, six German decisions and three Swiss judgments are fully set out. Only a single French decision is brought in.

Several particular points should be raised with reference to certain parts of the book. The first chapter of the first part is a well written introduction of twenty pages. The author points out, *inter alia*, but does not adequately explain, that comparative law is a method rather than a subject of law. It is not too easy to see why comparative law differs in this respect from any other branch of law. Surely, one can equally argue that the law of torts is the method of granting remedies for non-contractual injuries, or that the law of property is the system of determining rights over land. The mere fact that comparative law is "a way of looking at legal problems" would not necessarily render it a method rather than a subject. The English Principles of Equity, too, offer a way of looking at legal, or rather jurisprudential, problems. Nevertheless, one could hardly argue that Equity is a method and not a subject. One could with respect well argue that while the Law of Contract and the Law of Torts are subjects dealing with the nature of rights and remedies, Comparative Law is a subject which compares rights and remedies of different systems.

The second chapter of the first part deals with the treatment of foreign law problems in the American courts. Since the book is meant for the American practitioner the inclusion of a short chapter of this kind would seem inevitable.

The chapter, as written, is far too elaborate. Its one hundred and thirteen pages include a discussion of such remote subjects as the Proof of Foreign Documents in American Courts, and the Art of Examining and Cross-Examining Foreign Law Experts. Since all these problems are adequately discussed in numerous works on Evidence and Civil Procedure it might have been advisable to shorten this chapter which is somewhat outside the scope of a comparative law study.

The best of the second chapter of the first part is the account, (at pp. 66-68), of legal education in Civil Law countries. The special qualifications of the different types of lawyers in France and Germany and their legal education is of great interest. It is felt that this discussion warranted more details and should, perhaps, not have been treated merely as a sub-section of Proof by Experts.

Following the long second chapter there is a very short third chapter about the 'tools of the trade', *i.e.* the main sources of foreign law. This account of six pages hardly does justice to this subject.

The second part of the book is, no doubt, the best one. It is divided into three chapters, *viz.* a) Common Law and Civil Law Jurisdictions Distinguished, b) Procedure in Civil Law Countries and c) Substantive Law. The first chapter is, to some extent, a further, very useful, introduction. Attention should be drawn to the section respecting the geographic expansion of civil and common law. Though the learned author does not stress the point, it becomes clear from his account that, unlike civil law which was often imported by independent countries, the English common law was invariably imported during periods of conquest, colonization or occupation. This difference in the expansion of common law and civil law does, no doubt, follow from the complicated nature of the English legal system. The author shows, at the same time, that countries which have imported the common law very rarely abandon it. Countries which have adopted civil law codes, on the other hand, seem to have less misgivings about changing their systems.

The author should be congratulated for the second chapter of part two. He succeeds to bring a lively and entertaining discussion of modern civil law procedure. The chapter is written as a fictional dialogue (between three persons!) concerning a "Not-Too-Fictional-Case", in which Professor Comparovitch answers the questions of the American Lawyers, Messrs. Smooth and Edge. Accordingly, the different aspects of continental civil procedure are introduced in the same order in which a practitioner would proceed to acquaint himself with the foreign law before bringing an action. The dialogue commences with the selection of foreign counsel, and proceeds with a discussion of counsel's fees, "Jurisdiction", pleading and formation of issues, evidence, judgment and appeals. This might not be the order employed in textbooks of civil procedure. An attorney, however, might find this order useful. Professor Comparovitch's answers are very clear and the dialogue is very readable. After explaining the nature of an appeal in the civil law systems Professor Comparovitch and the two attorneys make a break for lunch. The meal must have had its own merits since — when the dialogue is resumed later on — Professor Comparovitch's account of the commercial courts in France and Germany is somewhat vague and arbitration is only briefly mentioned and dismissed. Professor Comparovitch, nevertheless, recovers and the discussion of public law disputes and the distinction between administrative and ordinary tribunals and their jurisdiction in civil law countries is highly commendable.

The third chapter of the second part is entitled Substantive Law. Actually, the chapter is confined to three subjects. The first section concerns the System and Organization of the Codes. The continental classification into civil law and commercial law is dealt with cogently. Reference is made to the English medieval law classification of civil law and commercial law. The second section of this third chapter regards the application of the Doctrine of Precedent in civil law countries.

The learned author shows how wrong it is to think that this doctrine has no application in continental law. The third section, *i.e.* Political, Social and Moral Elements in the Principal Codes, is most stimulating. More than any other part of the book does it reflect the spirit of the modern civil law systems.

The weakness of the third chapter, and to some extent of the whole book, is that the learned author confines himself to a discussion of substantive law from the point of view of rights only. Neither under the heading of substantive law, nor alternatively under the heading of civil procedure, does he introduce the continental remedial concept. Since the attitude of civil law to granting remedies forms an important dissimilarity between common and civil law its omission is to be regretted.

The third part of the book gives a comparative analysis of three topics, namely: agency, corporations and conflict of laws. No subject would be more suitable for comparative study than private international law. A comparative study of corporations, too, might be of great interest for the practitioner. In the twentieth century most foreign law investments would be in foreign corporations. At the same time, since the law of corporations is—even in common law countries—statutory the comparison would be of less interest for the academic lawyer. Reservations must be made with respect to the choice of agency as one of the topics. The selection of breach of contract rather than any special contract might have been more appropriate. The different concept of rescission of contract in civil and common law countries would have given the reader at least some reflection of the peculiar remedial concept of the modern civil law.

The author's survey of Comparative and Foreign Law Materials is no doubt of great value, though Szladits' bibliography—published after the first edition of Professor Schlesinger's book—is more complete. A bibliography of comparative law materials in French and German languages and a bibliography of the main French and German standard textbooks might have been a useful addition.

In spite of the above remarks it should be stressed that Professor Schlesinger's book is a most important contribution to comparative law. Both, academic lawyers and practitioners who have an interest in comparative law should be recommended to read it.