CHAPTER V

Comparative Law and Legal Education

This section attempts an assessment of the teaching methods of comparative law, taking into consideration the techniques employed for the purpose in law schools of different countries. We depend regrettably upon rather old surveys as far as the American law schools are concerned, and our information about others is gleaned from secondary sources. A fresh attempt at a first hand survey of the teaching methods employed in law schools all over the world would have been a time-consuming process, probably involving some risks of frustration. Therefore, we thought, even a cursory information based on secondary sources would not entirely be a vain undertaking. But before we embark upon this enquiry a preliminary query deserves our attention, *viz.*, what is its place in legal education?

General

The objections to the inclusion of comparative law in law school curricula range from the practical difficulty of overloading an already loaded syllabus to the man-of-the-world's aversion to such "cultural" subjects. Any answer to this outwardly reasonable objection will have to take into account the system of legal education that obtains in a country and the goals it strives to achieve. It also entails, to be fair, an enquiry into the successes and failures, stresses and strains of such a system—which is quite obviously outside the scope of the present work.

The methods and institutions pertaining to legal education differ from country to country in accordance with professional and academic needs.[1] The organization of the legal profession in England makes a sharp distinction between two kinds of practitioners, *viz.*, barristers and solicitors or notaries. Since the functions of these practitioners are different so are the requirements of their professional qualifications. Judges and magistrates are appointed from the ranks of senior practicing advocates. In other legal systems, French for instance, the magistracy is a separate career which a man enters upon at a comparatively early age and for which he requires special training and qualification.

The professional training and other educational qualifications vary to suit the organization and conception of the legal profession. In France, law schools organize courses in cooperation with magistrates, advocates, and practicing advocates and award three kinds of degrees: *licencie[en droit* (which qualifies the holder for legal practice as well as for entry into administrative service); *diplome de capacitaire en droit* (which also has pro-

1. See for a detailed assessment, A. H. Campbell, "Comparison of Educational Methods and Institutions", 4 *J. Legal Educ.* 25-58 (1951).

fessional value, though less than that of the licence); *certificat d' aptitude à la profession d'avocat* (meant only for intending advocates). In Germany after a three years course ending with a state examination a title of *Referender* is awarded. But the candidate is expected to undergo a further three year's course of systematic practical training in courts and legal offices before he presents himself for the second state examination (*Assessor-examen*) to qualify himself for professional examination.

The procedure in England is different. The formal requirements for admission to the English bar involve no compulsory theoretical training, practical apprenticeship or institutional attendance. One who intends to practce needs only to enroll in one of the ancient societies of barristers (Inns of Court), dine in the hall of his Inn on the required occasions, and pass two examinations of no particular difficulty. However, he cannot take a case, directly from a litigant. The solicitor comes in between. The professional and academic requirements for a solicitor are more exacting : three years of apprenticeship in a solicitor's office, after graduation; success in three professional examinations; attendance for a year in a law school.

The point has been laboured at some length to show that the organizational structures ensuring legal education in the above countries try to make a distinction between the lawyer-jurist, the lawyer-notary, the lawyer-philosopher, the lawyer-academecian, the lawyer-administrator, etc. Evidently the primary concern for a jurist and a legislator is ensuring justice. The notary does not require to speculate profoundly on the problem of justice as does the legal philosopher. The legal philosopher need not have a mastery of detailed rules regarding attestation and stamping of documents. The lawyer-administrator requires more than purely legal knowledge. And so on.

Cultural and Vocational Training

The first task of the law school therefore is to make a distinction between *cultural* and *vocational* training, and then to strike a balance in their syllabi in order to produce harmonious, well-rounded lawyers. It is important to bear in mind that cultural training is very important during the formative years of youth. A number of suggestions on the extra-legal level have been made from time to time about the way such a cultural training could be imparted. Different legal systems and law schools have evolved varying kinds of curricula with this object in view. The French and German law schools offer courses in political theory, economics, and social science to law students. In the U.S. they go a step further. The Yale Law School regards it as "self-evident... that the study of law will be most fruitful and critical when the skills and perspectives of history, economics, statistics, psychology, political science, sociology and psychiatry are fully and effectively used in the work of the law schools."[2] The Harvard Law School insists, more realistically, on economics-orientation from its students.

The law school curricula in other countries invariably include legal philosophy, sociology of law, legal history, jurisprudence and many more such avowedly cultural subjects. The latest entrant, of course, is comparative law. In order to find out whether or not comparative law is a cultural subject one has to take several factors into consideration. The distinction between cultural and vocational subjects presumably is drawn on the basis of its utility. Utility of a subject, it goes without saying, has to be

2. Cited in *Ibid.*, 34.

seen both from the long-range and short-term view-points. It was seen in the preceding section of this monograph that comparative law has a practical utility to the legislator, judge, lawyer, and administrator. In addition to the arguments adduced therein in evidence of its utilitarian aspect it must be maintained here that even if it is assumed, which will be a wrong assumption in the present submission, to be a cultural subject, the law school curricula needs to strike a healthy balance between the "bread and butter" subjects and those that can be regarded as cultural.

Indian Law School Syllabi

Now, let us take the syllabus prescribed for the Indian law schools by the Bar Council of India. In the whole list of the ten compulsory subjects only two can be properly regarded as cultural, namely, legal and constitutional history and legal theory. Jurisprudence and comparative law have been lumped together in the latter item. The list of optional subjects contains a more numerous sprinkling of cultural subjects: equity, public and private international law, interpretation of statutes, legal remedies, etc. The character of subjects like international economic law, military law, international organization, which also find place in this list, is harder to pigeonhole.

As a matter of fact the utility of a subject also depends upon the development of the society. To take the American experience,[3] four generations ago the subjects regularly taught in leading American law schools consisted substantially of contracts, torts, property, criminal law and procedure at law and in equity. With the passage of time, conflict of laws, bankruptcy, corporate reorganization, administrative law, taxation, labour law, antitrust law and trade regulation became standard offerings. As for as comparative law is concerned not only a great number of law schools in America offer a course in this subject, but also there are regular institutions devoted to the subject.[4]

Again, the nature and needs of the society dictate the courses in law schools. In America, for instance, comparative law grew up, to begin with in metropolitan cities on the sea-coasts with large commercial interests. The trading communities in these coastal cities looked for lawyers who knew foreign law to help them in international litigation. Also, the state of Louisiana, which through a combination of historical and other circumstances had—unlike the other constituent units—the Civi Law system, became the centre of comparative studies. Individual immigrants who were well versed in the legal systems of the countries of their origin, too, helped build up comparative law studies; Rabel at Michigan, Rheinstein at Chicago, Ehrenzweig at California.

Political upheavals, in the words of Schlesinger, and the resulting migrations, coupled with the general quickening in the tempo of interchange of persons, goods, and ideas, accentuated the need for lawyers trained in more than one legal system. The same factors created a favourable atmosphere for the teaching of comparative law.[5] The reluctance to espouse this com-

3. See Milton Katz, "International Legal Studies : A New Vista for the Legal Profession", 42 *A.B.A.J.* 53-56, 91-92 (1956).
4. See J. H. Stevenson, "Comparative and Foreign Law in American Law Schools", 50 *Col. L. Rev* 613-28 (1950); also R. H. Graveson, "The Teaching of Comparative Law in U.S.A.", 32 *J. Comp. Leg. Int'l L.* (3d Ser.) 31-6 (1950).
5. See R. B. Schlesinger, "Comparative Law : The Reaction of the Customer," 3 *Am. J. Com. L.* 492 (1954).

paratively new discipline can perhaps be attributed to the not very conspicuous atmosphere of the above nature in India. But it would be wrong to underestimate the potentialities of the "interchange of persons, goods, and ideas" of our country. India is on the threshhold of large-scale international economic coöperation. It would not be long before the demand for experts on foreign law will be made. It would not be surprising if already some leading law firms in metropolitan cities are feeling the pinch.

The justification for teaching comparative law, however, does not entirely lie in the demands of the business community reflected through the legal profession. Moreover, how many of our law students enter the legal profession? It lies essentially in the aesthetic need of turning out lawyers who have a better understanding of their own law. One cannot attain such an understanding unless one takes an objective view. And to have an objective view one must view it as an outsider and in comparison with other legal systems. The situation has often been compared to that of learning foreign languages. A man, it is said, who knows no language except his own is far less able to appreciate its beauty and to understand its structure than he who can compare it with the languages of other nations. The strength and weakness of one's own law can be better seen by those who knew something about foreign law than by those who knew nothing about it. It is only such a student who can shift essential rules from the ones which are accidental products of history and tradition. The rationale has been ably expressed by Gutteridge in these words:

> "An adequate foundation for legal reasoning is not laid only when the principles of one system of law are taught. The student does not have sufficient relative criteria from which to reason and exercise his imagination...(Comparison) would also enrich the cultural values of a legal education. A well-trained lawyer should be more than a technician. He must be a resourceful social engineer in working out the pacific adjustment of controversies in a world which is growing smaller daily due to the rapidity of communications and transport."[6]

Schlesinger's Five Tricks of Trade

A number of objectives other than the one mentioned above have been put forward for teaching comparative law to students, and we have dealt with them at some length in the first section of this monograph. What is of immediate importance in the context of a discussion on teaching is the motivation. For, as Schlesinger so pertinently points out, if psychology has taught us anything it is not to disregard the problem of motivation, including the problem of what the students *want to learn.*[7] Schlesinger offers useful tips which he candidly calls the "five tricks of the trade."[8] We thought it appropriate to reproduce them:

1. The total area of what can be described as comparative law is boundless, and everyone planning a course of such descriptin is faced with a threshold problem of selection. He must choose, geographically, and historically, the legal system or systems to be studied. He must choose illustrative subjects and types of materials. I submit that in making such choice

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6. H. C. Gutteridge, "The Teaching of International and Comparative Law", 23 *Jr. Comp Legislation and Int'l L.* 64 (1941).
7. R. B. Schlesinger, "Teaching Comparative Law: The Reaction of the Customer," 3 *Am. J. Comp L.* 496 (1954).
8. *Ibid.*, 499-501.

he will do well to select problems which are likely to come up in the private or governmental work of lawyers practicing in the student's country.

2. Even if the instructor knows that the problems he presents are likely to occur in the student's later practice, it cannot be presupposed that such knowledge is shared by the students. This knowledge, so basic to their motivation, must be driven home to them as early in the course as possible. As law students are educated to be skeptical, the instructor's ipse dixit will not suffice. Real-life illustrations, whether taken from reported cases[9] or from other sources, will be more convincing.

3. Lectures or case method? My answer to this question, embodied in my own "Cases and Materials,"[10] was in favour of cases, although with a generous admixture of translated code sections, other statutes, quotations from text writers, and text notes of my own. The large majority of 29 reviewers approved the method, at least in principle. I was much impressed, however, by the reservations which some thoughtful European reviewers voiced with respect to the use of the case method in teaching comparative law.[11] On theoretical grounds, their arguments are forceful.[12] But I think it is fair to say, on the other hand, that most civilians who attended case-method courses on comparative law in the United States, went away convinced that the method works, and that even in terms of systematic coverage American students gain as much by the use of this method as they would from an equal number of lectures supported by the reading of a textbook.

With American students the case method works because they are accustomed to it, and trained in its use. For the same reason, the lecture-textbook method, supplemented by seminars, continues to produce fine lawyers in most other countries. This is not the place to strike another blow in the never-ending dispute whether in general one or the other method, or one of the countless combinations thereof, should be preferred. By the time a student takes up comparative law, which is always an upper-class or graduate course, his study habits are apt to be established. Since the subject itself is foreign and unfamiliar, it seems particularly important not to increase the beginner's discomfort by introducing, at the same time, an unfamiliar method of teaching. I submit, therefore, that there are strong educational reasons for using the method in which the students are generally trained, that is, a modernized casebook method[13] in North America, and the lecture-textbook method, with

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9. In this respect, the teacher of comparative law is helped by such massive collections as Dr. Domke's Digest of Foreign Law Cases which appears in every issue of the *American Journal of Comparative Law*, and the *Supplements* ("*Die deutsche Rechtsprechung and dem Gobiete des internationalen Privatrechts*," *edited by Dr. Makarov) published by the Zeitschrift auslandischesund internationales Privatrehct.*

10. See n. 8 *supra.*

11. See Book Reviews by A. Tunc, *Revue Internationale de Droit Compare* 1950, 802 and by K. Zweigert, 17 *Zeitschrift fur auslandisches and internationales Privatrecht* 397, 404 et seq. (1952).

12. Considerations of space prevent me from discussing these arguments here; but this self-limitation is intended to be "without prejudice".

13. Practically all editors of recent American casebooks have made use of textual materials, whether quoted from other authors or written by the editors themselves. The "casebook" thus does not exclude text materials; it merely changes their arrangement and, in varying degrees, may reduce their importance in the learning process because in the students' minds the cases will stand out as the principal landmarks.

By the same token, the modern case method no longer confines work in the

whatever enlivening features have been added recently, in most other countries.

4. Comparative law involves comparison, usually with the student's own legal system. Depending on the precise stage of his studies which he has reached, the student will have mastered some parts of his domestic, curriculum more completely than others. Even if he takes a comparative law course on the post-graduate level,[14] he may not be familiar with more or less specialized subjects such as labour law, trade marks, or copyright. Therefore, unless the course is given for specialists who know their special field at least in its domestic aspects, it seems advisable to choose illustrative subjects with which the non-specialist, at the students' particular level of legal education, may be expected to be familiar.

The instructor, moreover, should at each turn attempt to weave the contents of the comparative law course together with what the student has learned in his other prelegal or legal courses. Without such connecting link, which ties comparative law to the student's general and legal experience, the presentation of a foreign legal system will strike the student as abstract and bizarre.

5. Any method of teaching, in the end, is as good as the teacher who uses it. Of the qualities which should be required of a teacher of comparative law, some are obvious, such as the requirement of complete mastery of the legal system in which his students have been brought up. Not quite so obvious, perhaps, but highly important, is the postulate that his activities should not be permanently limited to comparative law, even though his research and writing be so confined. Only an instructor who also teaches "bread and butter" courses, or practices "bread and butter" law, will have sufficient contact with the general body of lawyers and law students in his country to know their interests and working habits and to be familiar with the range of their knowledge of their own law. If he lacks that familiarity, his teaching will betray him as a dweller of the ivory tower.[15]

Keeping these "tricks of the trade" as a backdrop let us examine as to how law schools in different countries have endeavoured to offer courses in comparative law. We will deal with the course-content first.

Course-content

Surveying the comparative law curricula of twenty six American law schools Stevenson made a five-fold classification in 1950 of the course-content;[16] (1) courses in Anglo-American law into which comparative materials are introduced wherever appropriate; (2) comparative law courses in which both Anglo-American and foreign materials are assigned on an approximately equal basis; (3) comparative law courses in which only foreign materials are assigned; (4) pure foreign law courses; (5) courses in comparative jurisprudence. We will have a good deal of comment to

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classroom to the dissection of cases. While the cases are still considered useful as the best vehicle for stimulating active student participation, they do not preclude such doses of systematic lectures as the instructor thinks necessary.

14. See Schroeder, *Comparative Law: Teaching Lawyers* (paper prepared for the Fourth International Congress of Comparative Law).

15. I must repeat here, with special emphasis, the caveat in n. 19 *supra*.

16. J. H. Stevenson, "Comparative and Foreign Law in American Law Schools," 50 *Col. L. Rev.* 613-28 (1950).

make on the above methods in the ensuing pages, but one particular notion needs to be clarified here at this stage, namely, the propriety of offering pure foreign law as a comparative law course.

Stevenson in the above survey points out that except for Roman law no American law school offers courses in which only foreign law is taught without employing the comparative method. Even the Harvard and Columbia Universities which trained specially selected teachers[17] to master Civil and Soviet law respectively by sending them on prolonged field research offer courses in those legal systems only comparatively. That is as it should be. For, as Rheinstein affirmed, comparative law "should not be used to denominate the studies of foreign law carried on by juristic lay people," however useful such studies might be for the understanding of the "peculiar genius of a particular people;" it could be assimilated to the study of their poetry, pottery, philosophy, or religion.[18] At another place Rheinstein elaborated the idea further:

> Comparison presupposes knowledge of the phenomena to be compared and our students cannot be expected to know any law other than their own. Before they can start to compare they must thus be made acquainted with the foreign law, and probably no course in comparative law, as taught at present, is long enough to provide extensive knowledge of foreign law. Indeed, what do we mean by foreign law? Obviously not the totality of all the laws presently in force in all countries of the world. We must pick and choose...[19].

Roman Law, for historical and cultural reasons, has not ceased to attract the modern Anglo-Saxon mind. In England, especially, the sway of Roman Law is far from diminished. Witness, for instance, Gutteridge's preference. "So far as English law students are concerned the writers before preference is for the comparative study of a selected topic, complete in itself and not too wide, which could be studied as it emerges from not more than two systems, *i.e.*, English Law in comparison with Roman Law or the French Civil Code."[20] True to the tradition, his successor to the chair of comparative law at Cambridge, Hamson, teaches a particular topic entitled "English and French Methods" comparatively with English and French Legal systems as models. Picking up Gutteridge's strand of thought it might be mentioned that he listed a number of books[21] that were available if one chose to concentrate on Roman Law for comparison with the Common Law. The list was as follows:

Buckland & McNair,	*Roman Law and Common Law. A Comparison in Outline.* London: Cambridge University Press (1936).
Buckland,	*A Text-book of Roman Law* (2nd ed.) London: Cambridge University Press (1932).

17. See for details, R. H. Graveson, "The Teaching of Comparative Law in U.S.A.", *32 J. Comp. Legislation and Int'l L.* (3rd ser.) 33 (1950).
18. Max Rheinstein, "Teaching Comparative Law," 5 *U. of Ch. L. Rev.* 617 (1938).
19. Max Rheinstain, "Teaching Tools in Comparative Law: A Book Survey", 1 *Am. J. Comp. L.* 103 (1952).
20. H. C. Gutteridge, "The Teaching of International and Comparative Law", 28 *Jr. Comp. Legislation and Int'l L*, 61 (1941).
21. *Ibid.*, 63-64.

Buckland,	*The Main Institutions of Roman Private Law.* London: Cambridge University Press (1931).
Burdick,	*The Principles of Roman Law and Their Relation to Modern Law.* Rochester: Lawyers Cooperative Publishing Company (1938).
Holmes,	*The Common Law.* Boston: Little Brown & Co. (1881). See references to Roman Law.
Mackintosh,	*Roman Law in Modern Practice.* Edinburgh: W. Green & Sons, Ltd. (1934).
Pound,	3 *Illinois Law Review*, p. 1.
Pound,	13 *Illinois Law Review*, p. 667.
Radin,	*Roman Law.* St. Paul: Publishing Company.
Sohm,	*The Institutes, A Text-book of the History and System of Roman Private Law*, Translated by James Crawford Ledlie. 3rd ed. Oxford: Clarendon Press. London, New York: H. Frowde (1907).
Williston,	*Contracts*, (see notes at ends of sections).

A little later[22] Gutteridge extended this list to cover other legal system, with critical comment: Amos and Walton's *Introduction to French Law*; Lee's *Introduction to Roman-Dutch Law*; Schusters' *Principles of German Civil Law*; Williams' *Swiss Civil Code*; Burges' *Colonial and Foreign Law*; Walton's *Egyptian Law of Obligations.*

Recent trends in the teaching of comparative law in the U.S.A. and England seem to veer round to international business law and the Common Market law. The point is, the trends reflect the current preoccupations and sometimes the predilictions of the nations concerned. Thus some comparatists concentrate on a limited number of legal systems, such as those of Western Europe or of the Middle East or of the Communist countries of Eastern Europe, others seek to elucidate different approaches to a limited number of legal topics in a large number of countries, still others, like Rene David of France, make the whole world their parish and try to paint on a broad canvas "*Les Grands Systemes de Droit Contemporains*".[23]

The Soviet law schools, we know on the authority of Hazard,[24] teach comparative law course entitled "The Law of Bourgeois States." The purpose of such a course has been explained this way:

> "We must know and we do firmly know that all progressive humanity turns its eyes not toward the Justinian and Napoleonic codes, but to the Stalin Constitution and the laws created on its foundation. Our law is the highest type of law, and there is nothing fortuitous, in the fact that the peoples' democracies are learning from us, and among other fields, in that of law. It is, of course, necessary to know both

22. H. C. Gutteridge, "Comparative Law as a Factor in English Legal Education," 23 *J. Comp. Legislation and Int'l* (3rd Ser.) 131 (1941); substantially reproduced as a chapter in his *Comparative Law, An Introduction to the Comparative Method of Legal Study and Research*, 127-144 (1946).

23. For a book based on this conception see, Rene David and J.E.C. Brierley, *Major Legal Systems in World Today* (1968).

24. John N. Hazard, "Comparative Law in Legal Education", 18 *U. of Ch. L. Rev.* 273 (1951).

> Roman and contemporary bourgeois law, but first of all it is necessary to know Soviet socialist law thoroughly. Bourgeois law must be known not in order to borrow its ideals, but so that, knowing our own and an alien law, we may perfect our own and expose the reactionary, exploiting character of bourgeois law, striking at its most sensitive spots".[25]

Bereft of its ideological tone the Soviet scheme also appears to be aimed at a better understanding of their own law.

At the end of this admittedly cursory survey of the courses offered in law schools of different countries under the *genre* comparative law it must be stated that the course-content vary enormously. And all comparatists with unusual unanimity agree that it should be so. Kahn-Freund speaks eloquently of the "exciting and also exacting" voyage of discovery that every teacher of comparative law must make before he decides on the field he wishes to cultivate and the tools and implements that he wishes to use in cultivating it.[26] He affirms categorically :

> "On the professor of comparative law the gods have bestowed the most dangerous of all their gifts, the gift of freedom. All he undertakes to do is to teach and to develop some legal subjects by comparing a number of legal systems. It is for him to select the subjects, for him to select the systems, for him to decide whether he wants to compare doctrines or practices, structures or functions".[27]

Kahn-Freund adds, however, that if this gift of freedom is to be properly utilized the comparatist should "place himself outside the labyrinth of minutae in which legal thinking so easily loses its way and see the great contours of the law and its dominant characteristics".[28] Borrowing Bentham's simile, he urges the teacher to be "a comparative physiologist rather than...a comparative anatomist".[29]

How, then, can a teacher do this job. The degree and intensity of the probe will, of course, depend upon the needs and capacities of students. The requirements have to vary in accordance with different departments of study; namely, (*a*) undergraduate instruction, (*b*) post-graduate study, and (*c*) research. Since the problem of teaching students taking a course leading to the LL.B. degree is of utmost importance in India, a separate chapter has been devoted for this. We have another chapter on research. We have treated the intermediate level (LL.M.) cursorily on the presumption that it does not require special treatment. A *via media* of the above two courses might be struck for post-graduate instruction : more intensive study of a limited subject coupled with a dissertation on a chosen topic covering two or more legal systems, as a test of one's critical faculties.

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25. N. V. Kuzantsev, "Tasks of Scientific Research in the Field of Law", 2 Current Digest of the Soviet Press, No. 16, 5-6 (June 3, 1950). Cited in Hazard, *Ibid.*, 273.
26. O. Kahn—Freund; "Comparative Law as an Academic Subject", 82 *L.Q. Rev.* 41 (1966).
27. *Ibid.*, 41.
28. *Ibid.*, 40.
29. *Ibid.*, 45.