ADDENDUM

# Report

PRESENTED TO THE INDIAN LAW INSTITUTE ON 29 DECEMBER 1969

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I was invited to visit the Indian Law Institute in New Delhi in order to help to advise them on the teaching of Comparative Law at the LL.B. level and also more generally on the furtherance of comparative studies and the promotion of comparative research both at the Institute and at the universities in association with the Institute. I propose in this report to deal primarily with the first problem.

No doubt one of the reasons for the interest taken in the teaching of comparative law at the LL.B. level was the decision of Bar Council of India to require that that subject should have been studied if the student desired to proceed to enrollment at the Bar. My concern however was clearly and solely with the teaching of comparative law in academic courses irrespective of the professional requirements of the Bar Council as such. Accordingly I regard those requirements, which may well vary from time to time, as beyond my province; and I desire to make no observations upon them.

It was nevertheless pointed out to me that the Bar Council required only that the *subject* entitled Comparative Law should have been studied. They specified neither a *syllabus* nor a *paper*. It therefore remains a matter for further decision by the Bar Council whether the proposals which I subsequently make on strictly academic grounds, if adopted, do (as I hope they do) or do not satisfy the requirements which the Bar Council may from time to time for professional reasons judge it right to impose. In estimating whether those requirements are met it will have to be borne in mind that comparative law is a method of study and not a province or department of law and that it may be sufficient that the student has been adequately initiated into, and has been called upon to practise, this particular method of study.

In order to assist me, the Acting Director of the Institute, Dr. S.N. Jain, was good enough to call a conference during a period of two days (27 and 28 December) of some thirty persons, among whom deans and principals were strongly represented. I am greatly obliged to Dr. Jain both for holding this conference and more generally for constant assistance and discussion throughout my stay. This report does not aim to give an account of the proceedings of the conference or to set out its results. That is done in a separate paper by Dr. Rahmatullah Khan and Mr. Sushil Kumar, members of the Institute, who had been deputed by the Director to prepare material on the Comparative study of law and who had already made progress in the composition of a monograph for use specially in India. I wish to record not

only my thanks for the very valuable services they rendered to me personally but also my high appreciation of the extent to which they had made themselves familiar with such of the existing literature in English on Comparative Law. The paper which they prepared, for all practica? purposes on their own, and which was circulated to the conference, was a useful and helpful document and is particularly praiseworthy when it is remembered that they have been concerned with comparative law for not more than nine months.

The overwhelming consensus of opinion at the conference, every member present expressing his opining in turn, was that it was desirable that the comparative method of study be used at the LL.B. level, for strictly academic reasons and primarily in order to extend the intellectual horizons of the student and to encourage a more intelligent appreciation by him of his own legal system. With this opinion I personally agree.

It was stated that there is already a certain amount of comparative study in individual courses as they presently exist, notably in courses on Constitutional Law where reference is necessarily made to British experience as well as to the American, Canadian and Australian Constitutions. Similarly in courses on administrative law, where reference is commonly made to the French legal system, also. And for example in the study of family law, whether or not comparison is expressly attempted, a variety of patterns of law, including the Hindoo and the Mohammedan, is perforce presented juxtaposed to the student. It was however also stated that such comparison is often superficial and inadequate. Whilst unable of my own knowledge to endorse this judgment, I would agree with the further proposal that every effort should be made to extend and deepen, within the limits of the possible, the comparison which is appropriate to individual existing courses, and I so recommend. I believe further that the Institute itself would perform a useful function if, in conjunction with a selected number of teachers, it made suggestions for such extensions of comparative treatment in the case of existing individual courses and prepared appropriate materials—not for the purpose of prescribing for individual teachers how they should teach their own course but in order to enable them to teach comparatively in appropriate portions of their courses if they should wish to do so. I envisage the traffic as two-way. Individual teachers should also be encouraged to propose to the Institute methods and materials which they have found appropriate for comparative study and to enlist the Institutes's assistance in developing them. I think that the Institute should act both as an initiator and as a clearing house in this proposed operation.

Whilst such a development of comparative study would be useful and welcome, I doubt that it would be regarded sufficient for purely academic purposes. [I wish again expressly to refrain from expressing any opinion about whether it should or might be regarded as sufficient by the Bar Council for its own purposes]. If a college or Department were to accept it as sufficient, I think that some person in the college or department should be charged with the duty of ascertaining the extent to which comparative treatment was in fact given in the individual courses, of coordinating such treatment and of reporting on its sufficiency or deficiencies.

If such comparative instruction in individual courses is judged not to be sufficient for academic purposes—and personally I believe that it is scarcely likely to be sufficient—the question then is what separate and specific teaching ought there to be of comparative law as such? [There was vehment discussion of, and dissent on, the question whether, if there was a

separate and specific paper arising from the separate and specific teaching, that paper should be optional or compulsory. Whilst not wishing to express a categorical opinion of my own on a question in which local conditions may be an important factor, I think that persons who believe comparative study to be an essential element in an adequate academic training ought to take such steps as will secure that comparative study is not neglected at least by the abler type of student; and I think it likely that in law examinations, where professional pressure is considerable, that result will not be secured unless the relevant paper is compulsory either absolutely or sub modo.]

It is clearly not possible, and in my view it is undesirable, to seek to establish a standard pattern of such teaching and to try to impose it upon the vast variety of law schools in India. I think it more sensible to call attention to a number of different possible methods, the choice between them, or any other possible method, being left to the judgement and to the resources of each law school.

Some persons at the conference declared that they were already teaching comparative law expressly as such in conjunction with the course on Jurisprudence, and they proposed to continue to do so. [I should however also note that others were resolutely and vehmently opposed to linking conparative law with Jurisprudence]. Whilst such teaching of comparative law may not be the best (or at any rate is not the one I most prefer), it is I think a possible way of beginning comparative study; and it may turn out to be the one most feasible in many Indian law schools. It is in some ways the line of least resistance. Comparative study might then consist in explaining scope and purpose of comparative law, its purpose and its history, use being made of, for example, the appropriate parts of Gutteridge's 'Comparative Law.' Comparative study may also be linked with Jurisprudence, as one specific teacher proposed, by selecting some principal topics or institutions discussed in Jurisprudence, such for example as sources of the law, and examining them in the light of the material provided by the relevant parts of a book such as that of David and Brierly's 'Major Legal Systems in the World Today'. Again this seems to me a feasible, and in many respects a commendable, way of starting a comparative study, a great advantage being that it avoids the difficulty of finding appropriate materials since they are collected together in one book.

Alternatively, if it is desired to break the express link with Jurisprudence, the same book by David and Brierley can be taken as the basis of a separate course. That would be to adopt the practice of French law schools which some years ago instituted a course on the major Legal Systems of the World Today as part of their 'Licenze en droit' (LL.B.) teaching. Professor David has written perhaps the most notable book covering the prescribed course in French; and David and Brierley is the English translation and part adaptation of that book. To follow this line would have the advantage of adopting a course of study which, though no doubt elementary, has the approval of a first class set of law schools, and one which has been tried and found practicable. And again the great difficulty of material would be overcome, since the course could be based on a single prescribed book. Again, such a course of comparative study has much to commend it. The survey of major existing legal systems (which Professor David conducts with considerable simplicity as well as with considerable insight) is certainly calculated to broaden the student's

intellectual field and may induce some to take, later on, a more profound interest in one particular legal system or in some aspect of it.

It is clear that a variety of permutations and combinations is possible on the basis of David and Brierley's book—*e.g.*, by the selection of topics or the selection of systems, though in each case the selection may require the preparation of additional materials. If David and Brierley's book is to be used, I would like to stress my opinion that the portion dealing with the Common Law systems ought *not* to be omitted. It will be of particular importance to the education of the student of a system based on the Common Law and to his initiation with the value and scope of comparative study, to see what a comparative lawyer of the standing of Professor David has to say about the Common Law itself. This portion ought certainly *not* to be omitted on the assumption made by some persons at the conference, that the student would already be quite familiar with it. Two members at least of the conference stated that in their opinion comparative study should be based upon the study of one carefully selected foreign system only. Theoretically and academically I agree with this view—it is the manner in which I attempt to teach comparative law in Cambridge myself, in a course entitled 'English and French Legal Methods. But the course is directed to a selected group of fourth year (post graduate) students who have access to a library relatively rich in French legal material (in French). I personally doubt if it is possible to give such a course to LL.B. students. The effort to prepare and make accessible to students an adequate amount of material in English would be considerable and might be expensive. An individual teacher who wishes to make the effort and the experiment should of course be encouraged to do so, but I do not think that I should recommend the proposal as one to be generally attempted. An alternative type of separate comparative law course, and one which seems to me very attractive though relatively more difficult to prepare, would be based upon the selection of a number of topics which are judged by the teacher (and hopefully by the student also) as particularly important from a *specifically Indian* point of view. This would require a survey, by the individual teacher, of those areas or institutions of the Law which appear to him to cause special trouble in the Indian legal system considered as a going concern seeking to operate an effective social control over its actual environment. It would be out of place for a foreigner to attempt to specify such topics, but if one may extrapolate from one's own experience as a comparative lawyer, the list is likely to include such items as the administration of justice, the control of the executive, labour relations, or to take the title of a Cambridge paper 'The Individual and the State'. Under the administration of justice there would fall to be considered (if relevant) such questions for example as the recruitment of the judiciary (is the English type of judge the kind of judge most appropriate to the Indian scene ?—what other types of judiciary are known in the world ?—if the English type is judged the most appropriate are the circumstances such as are calculated to secure his continuance? If not, what alterations, are essential ?)—the method of trial (is the day in court type of process most suitable to civil as well as criminal trial, with similar alternative as above)—the method of bringing to trial a person accused of crime (is a proper equilibrium maintained by the existing process between the need to preserve individual liberty and the necessity of protecting the public interest). The list would also contain items of apparently humbler import—for example is the existing law of contract

calculated to secure the reasonable expectations of contracting parties, with reference perhaps particularly to standard form contracts.

What is suggested is that a rigorously selected list of such topics be settled by the person proposing to give the special course. It would certainly be no objection to the inclusion of an item that it might already incidentally to some extent have been discussed in an existing course—indeed that would seem to me a positive advantage. The purpose of the special course would be to set out the particular topic in as ample a comparative context as is reasonably possible, account had of the level of development and the ability of the student. The preparation of the material, which should be called from as great a variety of systems as may be, would present considerable difficulty; but it would also present a most valuable opportunity for collaboration between teachers and the Institute and for an important further development of comparative study on a more advanced level.

The role of the Institute should in my opinion be again one both of initiation and of response. It should endeavour of its own motion to enquire into a number of topics which *it* would regard as suitable for inclusion in a course of the kind proposed and initiate, with the collaboration of selected teachers interested in the particular topic, a discussion in the form of a seminar of the material which would be relevant to its proper consideration. It would be this material, or some excerpts from it, which the teacher could use, in mimeographed from, for the instruction of his students. And similarly the Institute should welcome proposals, from teachers undertaking such courses, of topics which they would wish to include in their course and which would require such consideration and discussion before they can be included.

The over-riding advantage of such a course is that it would attract the participation of the teacher himself in active comparative study on a topic which *he* considered important; and I believe that it is only if the teacher is himself actually and actively concerned with comparative study that he is able to communicate to the student a real sense of the value and importance of such study. No doubt the first attempts at collecting and discussing relevant material will be relatively modest. I do not see any objection to that. Indeed I belive that that is as it should, seeing that comparative study is in its early stages in India. What seems of great importance in the kind of paper here proposed is that it would provide a link between comparative study at the LL.B level and more advanced comparative study.

My report, I trust, makes it sufficiently clear that the final decision of what comparative law should be studied at a particular law school remains, and in my opinion should remain, with that school. The work of the Institute is to encourage a particular school to undertake comparative study and to help it to give that comparative study which it may decide that it wishes to give.

I wish to add one final consideration. There is a good deal of material for comparative study within India itself. We should not neglect it simply because it is at hand. Comparative study is not necessarily a study of exotic material. Similarly the fact that the Indian system is partly a common law system does not mean that common law systems are not appropriate material for comparative study in India. What is a striking modern development in Europe is the very intensive and fruitful

study of systems which are more closely related to each other (as members of the Romano-germanic family) than are members of the common law family. The problems which the Indian system has to cope with, however common law its core may be, are vastly different from the problems which the common law has to face in its native home (if only by reason of the scale of India and the variety and complexity of its environment); and an understanding of the intrinsic nature of the common law (of its disadvantages as well as of its advantages) is of much importance to a discernment of what is within its potentiality. An understanding of that nature is specially relevant to determining what changes *must* be made in the common law methods if they are to be able to deal effectively with the new situation which confronts them in India. And conversely an understanding of the changes which have been made, and which should be made, in India provides a measure of the inherent potentialities of the common law itself. The only drawback to comparative study of common law systems *inter se* is that it is a study which to be fruitful requires a high degree of insight.

Delhi
29 December, 1969

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