

not by the railroads to whose interest it is supposed to be so slavishly devoted. The Presidential Advisory Committee on Transport Policy has proposed legislation which the railroads favor and the trucks oppose. It is difficult to determine whether the President has thrown his effective support in any direction. The fact is that because the questions involved are so profoundly complex and difficult, because public and professional perplexity is so intense, and the opposing forces are so violently aroused, it is quite misleading to lay the blame for failure at any one door. Indeed, the inability to produce a new policy at will is not, in my book, ipso facto a failure, though it would seem to be in Professor Bernstein's.

One may, then, follow Professor Bernstein's argument that the merits of the independent agency have been exaggerated. But when he loads upon it all of the frustrations of his Utopian yearning, he is transcending analysis and providing himself with a sacrificial scapegoat.

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A COMMON LAWYER LOOKS AT THE CIVIL LAW. By F. H. Lawson. Ann Arbor: University of Michigan, 1955. Pp. xix, 238. \$4.00.

EXECUTIVE DISCRETION AND JUDICIAL CONTROL. AN ASPECT OF THE FRENCH CONSEIL D'ETAT. By C. J. Hamson. London: Stevens and Sons, Ltd., 1954. Pp. x, 222. 12s 6d.

Two recent books by English authors attest to the keen post-war interest in the United Kingdom in the teaching and research of comparative law. The authors, Professors Lawson and Hamson, hold the Chairs of Comparative Law at Oxford and at Cambridge respectively. Professor Lawson originally presented his essays as the Thomas M. Cooley Lectures (Fifth Series) at the University of Michigan; Professor Hamson's work represents the sixth annual group of lectures delivered in the United Kingdom under the terms of the Hamlyn Trust.

The Hamlyn Trust furnishes a convenient starting point for the present review. The terms for the administration of the trust provide for a lecture series "to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples."¹ Yet, despite this admonition, Professor Hamson's lectures under the Hamlyn Trust are unmarred by any smug, *a priori* assumption of the superiority of English law to alien systems; nor, for that matter, do Professor Lawson's essays involve such an assumption. Therein lies the particular interest and significance of the two works. Neither book is an attempt to explore hitherto undiscovered source materials or to break new ground from

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the research viewpoint; rather they are collections of the insights of two cultivated and thoughtful common lawyers looking at the civil law countries. The English have not been noted until recent years for their concern with the legal systems of other countries, particularly of those without a common law history. Except for the study of Roman law, long endowed in the ancient universities, comparative law has been the subject of rather infrequent academic legal study in the United Kingdom. Professor Lawson is in fact only the first incumbent of the Chair of Comparative Law at Oxford.

Because his subject for comparative study is administrative law, Professor Hamson has more to atone for in terms of the sins and omissions of his predecessors. The teaching of English administrative law has only in the last few years begun to come of age. This long delay in the process of maturation resulted largely from the savage attacks made seventy years ago by the incomparable Professor A. V. Dicey, high-priest of English public lawyers, upon the structure and organization of the emergent French administrative law. Dicey characterized the French system of separating special administrative courts from the ordinary civil courts as involving a double standard of justice—one system for a privileged group of officials and administrators, another and inferior variety for the ordinary public. Dicey, of course, never properly understood the French legal system of his day. But his polemics, written as they were in the most felicitous language and style, persuaded successive generations of English lawyers that special administrative law tribunals necessarily connoted governmental arbitrariness. He insisted that the classical concept of the rule of law must be sustained and rigidified by subjecting the rapidly burgeoning administrative law bodies in England to the control and supervision of the ordinary common law courts. Antiquated as these doctrines may seem today, it is only necessary to recall the intemperate invective against administrative law in Lord Chief Justice Hewart's *The New Despotism*, published only a generation ago, in order to appreciate the significance of Dicey's role in impeding for so long the adjustment of traditional English legal concepts and machinery to the pressing necessities of modern industrial society. Professor Hamson suggests, perhaps a little too generously, that had Dicey been alive today he would have preferred the current French system of a separate administrative law jurisdiction to the current "English situation which, upon pretence of maintaining a single universal jurisdiction, effectively exempts from any judicial control the critical entity in our present social system—the Minister and his Department."²

However that may be, Professor Hamson's own approval of the *Conseil d'Etat* and his admiration for its flexibility in the face of changing social conditions are very clear. This approval can be seen in his striking discussion of its decisions under the Vichy regime, when the *Conseil d'Etat* "for prudential reasons" might have been tempted to abate its own jurisdiction.³ The actions

2. *Id.* at 52.

3. *Id.* at 167.

of the *Conseil d'Etat* in this context are a clear refutation, if any further refutation were needed, of the belief after Dicey that special administrative tribunals must necessarily yield to the executive in any contest between considerations of governmental power and individual rights.

Professor Hamson is less sympathetic toward the *Tribunal des Conflits*, the special mixed tribunal set up to determine conflicts between the *Conseil d'Etat* and the ordinary civil courts. He does recognize that in contests for jurisdiction between the administrative and the civil courts the *Tribunal des Conflits* has tended increasingly to favor the former. He wonders, nevertheless, whether the heavy financial burden that the *Tribunal des Conflits* involves for the litigant and the extra complexities of law that come with it are really necessary. His argument continues:

"Is it really subversive of the French system that the judicial tribunal, if preferred by the plaintiff, should be permitted to assess the damages, exclusively against the State if necessary? Would it not be sufficient to provide that a *recours en cassation* could be brought to some specially constituted court in these cases in which it is really alleged that the judicial tribunal has misapplied the rules of administrative law? . . . To the foreigner it would seem that the process of conflict is sometimes actuated either by a fantastic spirit of legal refinement or by the mere obstinacy and caste-sense of the French fonctionnaire."⁴

Professor Lawson, for his part, ranges over a much wider area. His subject is code jurisprudence, and he canvasses in considerable detail the civil law systems of modern France, Germany and Switzerland, making occasional illuminating references to civil law experience in many other jurisdictions, including Quebec and Louisiana. He denies most effectively the traditional dichotomous classification of common and civil law systems in terms of their employment respectively of inductive and deductive judicial reasoning. While recognizing the strong elements of continuity and stability in civil law jurisprudence even if there be no formal civil law doctrine of precedent, he notes at the same time the flexibility in application and the changes in meaning of specific provisions of the civil codes, especially in the area of delictual liability. When Professor Lawson examines the relative standings in common and civil law systems of legislator and of judge, of legal practitioner and of jurist, he seems to look rather wistfully at the relatively higher regard accorded on the Continent to the law professor and commentator.

The most striking feature of Professor Lawson's approach to the civil law from the viewpoint of the North American reader, however, will surely be his emphasis on the importance of classical Roman law. Professor Lawson is concerned with tracing the source of modern civil law rules and procedures, whether of France, Germany or other countries, to the original Roman law source materials, and thus with viewing contemporary Continental legal systems as the products of a continuous stream of legal development from early times.

4. *Id.* at 87.

This particular methodological approach is readily adjusted to the special skills of Oxford students, who, at the baccalaureate level, are subjected to heavy doses of the *Institutes of Justinian*; but there may be a risk, correspondingly, of viewing the modern civil law systems only as something in the nature of appendages to Roman law. Professor Lawson makes a very eloquent plea for a return to the study of Roman law, though he concedes the special problems presented in this regard by the general decline in classical and Latin studies.

In the light of Professor Lawson's argument, it is well to note that despite the debt of the modern sociological school of law to the historical method (remembering the pioneer contributions to the sociology of law made by English legal historians like Maine and Vinogradoff), the historically-based approach to law has suffered considerably in the general post-war reaction to the neo-Hegelian excesses of the era between the two wars. In North America the rapidly proliferating courses in comparative law are largely attuned to the needs of the dominant pragmatic, instrumental approach to legal education, and its current emphasis on the importance of developing close legal associations with foreign countries. This approach results in an inevitable concentration on the current law of other countries and a concomitant tendency to minimize the quest for the historical antecedents of those foreign legal systems. The stress is on the particular responses of different legal systems to the same or similar types of social problems. The major North American works in recent years in the field of comparative and foreign law lend themselves readily to this sociological approach. I need mention here only Arthur von Mehren's comparative treatment of modern Western European private law⁵ and John Hazard's outstanding collection, written with Morris L. Weisberg, of cases arising under the Soviet Civil Code.⁶

Professor Lawson, in presenting his personal approach to the study of comparative law, makes an attractive cultural case for using Roman law not only as the starting point but also as the basic emphasis throughout. If such an approach seems to defer too much to the dead-hand control of history, it must be recognized that the sociological method of North American studies in comparative law makes very special demands on the law teacher: the unifying, integrative factor supplied by Professor Lawson's stress on the seminal contribution of classical Roman law must come instead from jurisprudence, or more strictly from comparative legal theory. A *via media* might be to use the historical method only by way of introduction to the study of the contemporary codes. Thus, for example, one might begin the study of the *Code Napoleon* with the historical division of France into the two zones, the *Pays de Droit Ecrit* and the *Pays de Coutumes*, tracing, in this introductory phase, the development of French law through the period of Monarchical *Rédaction des Coutumes*, the *Grandes Ordonnances* and the unifying work of the authoritative commentators

5. VON MEHREN, THE CIVIL LAW SYSTEM—MATERIALS FOR THE COMPARATIVE STUDY OF LAW (to be published in fall of 1956).

6. HAZARD & WEISBERG, CASES AND READINGS ON SOVIET LAW (1950).

(especially Pothier), up to the deliberations of Napoleon's codifying commission. A convenient starting point in the study of the German Code might be the bitter controversy between von Savigny and Thibaut over the principle of adopting a code for Germany, to be followed by the attack of von Gierke and the Historical School on the draft Code and Stammler's final effective rebuttal. A suitable introduction to the study of the code of Soviet Russia would be Reisner's post-Revolutionary arguments (following Petrazycki) for abrogation of the private law legislation of the old regime in favor of an intuitive law of the workers' class; and then the official retreat to enactment of the series of positive law codes still in force could be examined. This somewhat limited recourse to the historical method has a distinct advantage over Professor Lawson's predominantly Roman law-oriented approach. The former would allow an ultimate appraisal of the relative advantages and disadvantages of concretizing a nation's legal principles in the systematized, rationalized form that a code involves, not merely from the rather alien standpoint of the Anglo-American common law systems, but within the context of modern Continental code jurisprudence itself.

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CIVIL LIBERTIES AND THE VINSON COURT. By C. Herman Pritchett. Chicago: University of Chicago Press, 1954. Pp. xii, 297. \$5.00.

IN Charles Herman Pritchett the University of Chicago has a political scientist who follows the term-in and term-out work of the United States Supreme Court much more closely than all but perhaps a few lawyers and more painstakingly than most academic scholars in the law schools. This description, let it be said at once, is not intended in any way as a reflection on lawyers or teachers of law, but as a high compliment to Professor Pritchett. For it was he who eight years ago gave us *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947*. Now we have as a kind of successor rather than sequel, his new study of the Supreme Court's postwar work, *Civil Liberties and the Vinson Court*.

The two titles suggest an important difference in scope. *The Roosevelt Court* dealt with the Supreme Court's disposition of the cases of the decade 1937-1947. It reviewed the whole of the Supreme Court's case grist—including the fields of federal regulation, state regulation, taxation, civil rights generally and procedural protection in criminal prosecutions. But *Civil Rights and the Vinson Court*, as the title indicates, centers on those cases arising from conflicts between some unit of government and the citizen in the exercise of the human liberties that are proclaimed in the Bill of Rights.

Professor Pritchett applies a sound limitation in his new volume. In devoting

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