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Foreword

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Foreword: Comparative Law in the Late Twentieth Century

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The articles published in this issue of the B.Y.U. Law Review (the second issue of the J. Reuben Clark International and Comparative Law Annual) were originally presented at the annual meeting of the American Association for the Comparative Study of Law (AACSL) held at Brigham Young University and the University of Utah in October of 1986. The theme of the conference was "Comparative Law in the Late Twentieth Century." To understand the particular collection of articles assembled here, a few words are in order about the background theory that provided the "deep structure" of the conference.

The basic idea for the 1986 conference was sparked by an address by Professor Mary Ann Glendon at the 1985 annual meeting of the AACSL a year earlier. Tracking some of her earlier work,[1] Professor Glendon argued that the discipline of comparative law has grown up in the shadow of the great nineteenth and early twentieth century comparatists, and has been molded by the categories of their thought. Most comparative work has tended to be done in the classic domains of private law—obligations (contract and tort), property, family law, and the like—with some admixture of work in criminal law. Attention has focused on the core substantive areas typically encountered in the first year of law school in the common law world,

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1. Glendon, *The Sources of Law in a Changing Legal Order*, 17 CREIGHTON L. REV. 663 (1984).

and forming the backbone of the great European codes. Yet the center of gravity of contemporary law has shifted, if not away from, then certainly beyond these classic starting points. In every contemporary legal system, lawyers are deluged with complex regulatory statutes that occupy an increasing percentage of the time of legal professionals, legislative bodies, courts, government officials, and citizens.[2] The rise of the welfare state, or what the Germans call the performance state (*Leistungsstaat*) is the central phenomenon in the transformation of modern legal cultures. Professor Glendon's point in 1985 was that in significant ways, life in the shadow of the great comparatists has tended to blind comparatists to, or at least to distract them from studying, this fundamental transformation of twentieth century law.

Demonstrating the reality of the transformation is a simple task. Everywhere the shift is from the relatively clean and abstract categories of nineteenth century law toward more complex regulatory schemes. Contract law is overlaid with the intricacies of the Uniform Commercial Code, burgeoning consumer protection legislation, and more detailed regulation in areas such as labor law, employment discrimination, banking and securities regulation, etc. Classic tort law continues to provide starting points, but it is reshaped by workman's compensation laws, no-fault statutes, insurance law, and an array of specialized anti-fraud statutes or regulatory schemes that blur the boundary between contract and torts. The law of nuisance in traditional tort law ramifies into environmental law and regulation. In property law, uncluttered individualistic transactions between the owners of Whiteacre and Blackacre are increasingly confronted with the complexities of zoning, land use planning, urban redevelopment, and the complex public and private techniques of modern real estate finance. On what was traditionally the public side, administrative law has obviously eclipsed constitutional law in terms of volume of legal work, and the body of criminal law is increasingly being expanded by complex new statutes dealing with white collar crime, computer fraud, corporate criminality. RICO, rather than classic conspiracy, is the representative normative structure in this new age. Beyond all of this, new technology has brought new forms of legislation in its wake. For example, a

2. See Heldrich, *The Deluge of Norms*, 6 B.C. INT'L & COMP. L. REV. 378 (1983).

spate of new statutes dealing with issues of data protection and informational privacy have been spawned by the computer age.[3]

Once one has recognized the transformation, however, the question is what it should mean for comparatists. Growing numbers of German scholars have lamented the problem of the excessive proliferation of law (*Verrechtlichung*)[4]—and perhaps comparatists should be providing perspective on that problem. Another role that comparatists might play is one of mediating the transplantation of legal norms. In a variety of ways, from simply raising consciousness about differing legislative ways of dealing with pressing practical problems to providing a deeper understanding of how detailed legal norms actually function in other cultures, comparatists can contribute to such traditional aims of comparative law as facilitating legal reform[5] or promoting convergence among legal systems.[6] But methodologically, the question of how a comparatist should wrestle with the increasingly complex mass of legal materials is quite daunting. After all, some of the most sophisticated professionals in modern legal systems spend much of their lives specializing in narrow swatches of intricate modern law within a single legal system. How can a comparative scholar hope to achieve not only a comparable level of expertise in his or her own system, but also in one or more others, particularly given the added challenges posed by language barriers and broader cultural differences?

It was against this background that the 1986 AACLS conference was planned. The aim was to focus on the role of comparative law in the late twentieth century in three different contexts: 1) to explore general questions of comparative method, 2) to look at comparative perspectives on regulation and regulatory law, and 3) to examine the way that changing legal structures

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3. *See e.g.*, UK Data Protection Act of 1984, 1 HALSBURY'S STATUTES OF ENGLAND, CURRENT STATUTES SERVICE (Butterworths) 1189 (1984), *reprinted in* N. SAVAGE & C. EDWARDS, A GUIDE TO THE DATA PROTECTION ACT 104-53 (1984); Hessisches Datenschutzgesetz of Nov. 11, 1986, GVBl. I 1986 S. 309.

4. *See, e.g.*, Heldrich, *supra* note 2; H. Honsell, Vom heutigen Stil der Gesetzgebung (1979); Maassen, Die Freiheit des Bürgers in einer Zeit ausufernder Gesetzgebung, 1979 Neue Juristische Wochenscrift 1473; Mayer-Maly Rechtskenntnis und Gesetzesflut (1969); Starck, Übermass an Rechtstaat?, 1979 Zeitschrift für Rechtspolitik 209; Weiss, Verrechtlichung als Selbstgefährdung des Rechts, 1978 Die Öffentliche Verwaltung 601.

5. R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 6-8 (2d ed. 1978).

6. *Id.* at 8-10.

relate to changes in legal education and the structure of the profession.

The articles by Professors Fletcher[7] and Watson[8] explore the broader methodological issues. Fletcher's article attacks one of the central tenets of much comparative work: the functionalist perspective. This is the view that what counts in the comparative study of law is how particular substantive problems are solved, "not the ideas, concepts, arguments and doctrinal forms" that support the solution.[9] After showing how this approach is linked to the methodological outlook of the legal realists,[10] Fletcher contends that the life of the law lies not in functionalist experience or the realist "law job,"[11] but in the rich particularity of legal discourse. By looking closely at the language of the law—at central terms in various legal systems—one can begin to see the ways in which words "invoke the culture of which they are a part."[12] Fletcher sees such linguistic particularity as "the starting point for an analysis of our divergent legal cultures."[13] As he puts it, "[t]here are differences among the legal systems of the industrial world which are greater than they appear to the functionalist eye. There is little to be gained by ignoring the richness of legal languages."[14]

Fletcher's approach constitutes an important corrective to excessive functionalism, but he overstates the point. One of the virtues of functionalism is that it helps prevent the comparatist from being mesmerized by verbal labels. It is no secret that similar social problems may be dealt with by legal devices traveling under different names in different systems. Until functional equivalents have been identified, it is hard to know whether genuinely comparable legal institutions are being compared, and to that extent, the functionalist approach is critical to the comparative enterprise. The problem with functionalism is its tendency

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7. Fletcher, *The Universal and the Particular in Legal Discourse*, 1987 B.Y.U. L. REV. 335.

8. Watson, *Legal Evolution and Legislation*, 1987 B.Y.U. L. REV. 353.

9. Fletcher, *supra* note 7, at 336. For representative works advocating the functionalist approach, see 1 K. ZWEIGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 25-27 (T. Weir trans. 1977); Kahn-Freund, *Comparative Law as an Academic Subject*, 82 LAW Q. REV. 40 (1966); R. SCHLESINGER, FORMATION OF CONTRACTS 32 (1968).

10. Fletcher, *supra* note 7, at 339-40.

11. K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 290-309 (1941).

12. Fletcher, *supra* note 7, at 344.

13. *Id.* at 350.

14. *Id.*

to exaggerate the importance of outcomes and thereby to lose sight of the deep significance that subtle shadings of language have for the meaning of legal institutions from the "internal" perspective of those participating in them. Functionalism thus stresses the denotation of legal labels to the detriment of connotations. Both are critical to comparative law.

Watson's article examines the phenomenon of statutory law, and responds to charges that in some of his earlier work, he had understated "the revolutionary force of legislation and statutory law."[15] While acknowledging that legislation is less bound to tradition than case law, Watson shows on the basis of a wide range of examples drawn from numerous historical contexts that statutory law tends to be more stable and evolutionary than his critics imply. Virtually none of his examples are drawn from prototypical twentieth century regulatory statutes, but his article provides a vantage point from which to assess the explosion of bureaucratic law in recent years. Among other things, his article provides a useful benchmark from which one can inquire about the extent to which new types of law constitute a radical departure from the more stable statutory regimes of the past.

The next group of articles shift from general discussions of methodology and perspective to analysis of some of the key issues in modern regulatory law: regulation, deregulation, and industrial policy. Professor Wood's article[16] presents a valuable overview of the process of deregulation in the United States, describing the dramatic efforts of the past few years to reverse the tide of proliferating regulation. Particular attention is devoted to the deregulation of the airline and broadcasting industries. Both the legislative/executive and the judicial sides of the deregulation process are analyzed in considerable detail.

Professor Stanbury's article[17] examines direct economic regulation and reform efforts in Canada. Looking at the system as an economist rather than a lawyer, he identifies a number of distinctive characteristics of direct regulation in the Canadian setting: the widespread use of regulation to achieve "social" objectives, broad opportunities for the exercise of political influence, the use of broad legislative mandates and wide administrative

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15. Watson, *supra* note 8, at 353.

16. Wood, Fletcher & Holley, *Regulation, Deregulation and Re-regulation: An American Perspective*, 1987 B.Y.U. L. REV. 381.

17. Stanbury, *Direct Regulation and Its Reform: A Canadian Perspective*, 1987 B.Y.U. L. REV. 467.

discretion, and a broad exemption for regulated conduct with respect to competition legislation.[18] In general, he believes that Canada makes more use of regulation than the United States, and the Canada is likely to be less prone to deregulate.[19]

Professor Matsushita's piece[20] provides an extremely useful overview of the legal framework of Japanese industrial policy, which has played a major role in the expansion of the Japanese economy. After briefly describing the historical background for Japan's unique blend of market economy and governmental guidance,[21] Matsushita explores its constitutional and legal constraints,[22] the role of Japan's Antimonopoly law,[23] administrative guidance as an instrument of industrial policy,[24] and the role of private agreements as instruments of industrial policy.[25] He then provides a sector-by-sector overview of how industrial policy has functioned with respect to basic research and development, depressed industries, small enterprises, price control, and international trade.[26]

Professor Eser's contribution[27] shifts the focus from economic regulation to the complex new issues that arise at the frontiers of research. It first traces the ways in which a researcher can be an offender—e.g., in human experimentation,[28] in violation of data protection statutes,[29] and in genetics and gene technology.[30] It then analyzes ways that researchers themselves can become victims. They may, for example, have insufficient protection for freedom of research[31] or problems of obtaining access to data.[32] Confidential information may become the target of governmental officials or third parties.[33] Pressures

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18. *Id.* at 523-26.
19. *Id.*
20. Matsushita, *The Legal Framework of Japanese Industrial Policy*, 1987 B.Y.U. L. REV. 541.
21. *Id.* at 543-44.
22. *Id.* at 545-47.
23. *Id.* at 550-51.
24. *Id.* at 552-53.
25. *Id.* at 553-55.
26. *Id.* at 555-70.
27. Eser, *The Researcher as "Offender" and "Victim"—Comparative Observations as to Freedom and Responsibility of Science and Technology*, 1987 B.Y.U. L. REV. 571.
28. *Id.* at 572.
29. *Id.* at 573-74.
30. *Id.* at 574-75.
31. *Id.* at 578-79.
32. *Id.* at 579-80.
33. *Id.* at 581.

for premature marketing of research or for socially-minded regulation of research may further inhibit the researcher.[34] As yet, these areas remain largely unregulated, but they suggest the range of new fields of regulation that lie just across the horizon.

The Wood, Stanbury, and Matsushita articles provide extremely valuable accounts of critical bodies of the complex, regulatory law that is so characteristic of law in highly industrialized societies. In some ways, however, they exemplify one of the problems the conference was designed to address: how should a comparatist wrestle with bodies of law of this complexity?[35] This is not a critique of the papers but a recognition that complexity ultimately becomes so great that it is difficult to go beyond mere description of complex legal structures to the more subtle penetration of cultural differences that a methodology such as Fletcher's[36] proposes to mine.

The final set of articles look at the structure of the profession and legal education. Professor Abel's study looks closely at differences in the structure of the legal profession in common law and civil law systems.[37] It suggests at the outset that the very idea of a legal profession "is essentially a common law folk concept."[38] The legal profession in Europe is more highly fractionalized into sub-professions, and a large percentage of those with law training do not pursue legal careers. The Abel paper then goes on to examine a fairly detailed set of contrasts between the nature of professional life in the two legal traditions.

Professor Clark's article[39] opens with a very useful summary of a variety of views and definitions of the legal profession, ultimately concluding that "to have a definition broad enough to permit comparative analysis of the legal professions in capitalist and socialist nations, Third World and developed countries, and under civil law, common law, and religious law traditions, one must focus primarily on the cognitive dimension of law."[40] With this in mind, Clark sketches the origins of legal training in medieval universities, and suggests that with the rise of academic le-

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34. *Id.* at 581-82.

35. The Eser piece escapes this difficulty only because it does not need to face the challenge of describing complex regulatory structures.

36. *See supra* text accompanying notes 7-15.

37. Abel, *The Transformation of Civil Lawyers*, 1987 B.Y.U. L. REV. 587.

38. *Id.* at 588.

39. Clark, *The Role of Legal Education in Defining Modern Legal Professions*, 1987 B.Y.U. L. REV. 595.

40. *Id.* at 601.

gal training in British and American universities, common law training has finally fused, in this century, with "a long and rich university tradition now more than nine centuries old."[41]

Professor Weyrauch's piece,[42] originally a comment on Abel and Clark is filled with lore about medieval universities and Continental professionals. To cite only one example, it traces teaching by hypothetical to times when professors had more to fear from alert censors than inert students.[43] In another charming passage, Weyrauch describes how a German student might (mis)understand a description of the institution of reading assignments in legal classes in the United States.[44] The lore and the charm, however, support a deeper thesis:

> The comparative literature in the United States and Europe abounds with unsettling evidence that the authors of great learning, while seemingly describing foreign legal education, have to a large extent depicted hidden and unconscious assumptions about their legal education at home. By doing so, they have involuntarily described peculiarities of their own legal systems, while believing to describe what they thought transpired elsewhere. In a warped and backhanded fashion their efforts still have scientific value because they show us covert characteristics of their home cultures that they normally would be disinclined to describe or even acknowledge.[45]

Weyrauch helps to remind us how difficult it is to see a different legal system, and how much of ourselves we reveal when we make the attempt.

The final article in this group is Professor Kato's comparative study of the legal profession in Japan and the United States.[46] To my mind, Kato's article is the best analysis to date of this topic. Statistics about the low number of lawyers per capita in Japan in contrast to the United States have attained considerable notoriety, but exactly what they mean about relative litigiousness of the two societies and the contrasting structures of the legal profession in the two countries has previously not been clear. Americans tend to read the statistics as signs that

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41. *Id.* at 604.

42. Weyrauch, *Medieval Universities, Germany and the United States: On Comparative Legal Education,* 1987 B.Y.U. L. REV. 613.

43. *Id.* at 616

44. *Id.* at 622-23.

45. *Id.* at 621.

46. Kato, *The Role of Law and Lawyers in Japan and the United States,* 1987 B.Y.U. L. REV. 627.

Japanese culture is more harmonious and smoothly managed than American society. On the other hand, Japanese scholars read the figures for many years as a sign that Japan was underdeveloped or premodern.[47] Kato provides a very careful analysis that shows how comparisons based on apparent differences in the number of "legal professionals" exaggerates the difference between the two countries. But he does not stop there. He goes on to critique new interpretations of the data suggesting that the number differentials really reflect non-cultural factors such as the inefficiency of the Japanese judiciary or the inconvenience of obtaining legal services in Japan.[48] Finally, he advances his own theory, which draws on both the cultural difference and inefficiency theories, and raises them to a new plane of integration and insight.[49]

As a group, the articles on legal education and the legal profession allow one to look at the phenomenon of law in the late twentieth century from a very different vantage point. Here the questions go to the comparative sociology of the profession in different cultures, and how that sociology interacts with the proliferation and increasing complexity of law in a more interdependent and technologically sophisticated world. As in each of the other two main areas of the conference, the articles do not directly answer the question of what the mounting complexity means for law and lawyers, but they provide a perspective from which one can begin to think about such issues. The 1986 AACSL Conference and the articles published in this issue will make a major contribution to the extent that they provide a framework for, and stimulate additional focus on, the challenge of grappling with the dynamic structures of late twentieth century law from a comparative perspective.

47. *Id.* at 627-28.
48. *Id.* at 627-28, 665-79.
49. *Id.* at 679-96.