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I

Legal science in the Western world is a child of the civil law. Inaugurated at Bologna early in the twelfth century by Irnerius after the discovery of the manuscripts of the Code and the Digests of Justinian, the renaissance of legal studies after the dark centuries succeeding the fall of Rome was predicated upon the Roman legislation as the subsidiary common law of Western Europe and stimulated the development of instruction in the civil law as a recognized faculty of the nascent universities.

In consequence, the academic instruction in law, focussed upon the progressive elaboration of legal doctrine from the Roman materials and their interpretation in conjunction with local statutes and customs in response to changing social and political conditions, was inculcated in generation after generation of jurists who by virtue of their training were not only to form, but also to administer, the laws of Europe and other continents. Hence came the rich civilian legal literature, preserving in written word the advancement of legal ideas; herein a common stock of legal conceptions, a universal *lingua franca* of law, was refined, and the civilian tradition of private rights, defined in accordance with these conceptions, was established as the measure of justice and liberty.

In truth, the reception of Roman law may justly be ascribed in the first instance to the fact that it was taught in the universities. Taught law, as Maitland has reminded us, is tough law; unless the Roman laws had been so persistently studied and the tradition of their authority as universal justice so engrained, they could hardly have been generally received. True, whether or not there was a formal reception, it was nowhere complete; the Roman doctrines were imbibed in modified form, as interpreted by the Legists and their successors in the light of con-

temporary legal science, or combined with native customs, or otherwise adapted to local conditions. In countries where the law was for the most part customary, this process of assimilation was effected chiefly by authoritative treatises through which the civil law conceptions filtered into general practice. Notable among these, both in the nature of its content and in point of time, appeared *Las Siete Partidas,* which Alfonso the Wise had compiled in the middle of the thirteenth century, though not officially adopted until 1348; as Gomez de la Serna has remarked, this code was "*compuesto en su mayor parte de leyes romanas y de decretales.*"[1] Similar examples of works primarily influenced by Roman ideas, which served to crystallize the existing laws in other countries include: the contemporaneous treatise of Bracton, *De Legibus et Consuetudinibus Angliae,* in England, and at a later date, Grotius' *Inleiding tot de Hollandsche Rechtsgeleerdheid* in the Netherlands, or Stair's *Institutions of the Laws of Scotland,* for example. This infusion of Roman principles, variably mixed with customary rules of Germanic origin, likewise formed the basis of subsequent official codifications in France, Prussia, Austria, and in many other countries; here too the essential impulse and the basic conceptions came from the jurists of the Age of Enlightenment and later times, in whose works these conceptions were generalized and synthesized conformably to contemporary conditions. Even more evidently, the common stock of legal ideas, formed by study of the Roman laws, was incorporated into those branches of law that transcend the limits of municipal regulation — in the law of nations, as notably expressed in the works of Suarez, Grotius, and Vattel, and in the efforts to construct a universal legal science by the writers on natural law and the more recent forms of legal philosophy. In sum, the fact that the civilian doctrines, in large part derived from the *Corpus Iuris Civilis,* were so long and so widely taught in the universities as the essential basis of legal science, was the primary condition of the reception of Roman law in the Western world; without this, the complex history of the assimiliation and adjustment to local conditions of these generally accepted doctrines, as from time to time incorporated in the positive laws, would not have occurred.

It would be a fascinating story to trace in more detail the evolution of European legal science, but one much too extensive

1. 2 LOS CÓDIGOS ESPAÑOLES xvii (*Introducción histórica*) (1848).

to be contemplated for this occasion.[2] Suffice it to recall that, after a brief period in which legal study was preoccupied with reconstruction of the Roman texts, attention was turned to their interpretation in the light of existing needs as the basis of the *usus modernus*, the general doctrine evolved by the Commentators and their successors, which formed the fundamental subsidiary law in countries where the civil law was received. This conception of a basic common law derived from current doctrine, quite analogous to that of the Anglo-American common law, though challenged in the sixteenth century and thereafter by the humanistic movement of Cujas and his successors, seeking by a more precise historical study of Roman antiquities to restore the sources, nevertheless prevailed until the eighteenth century, when the new courses in the law of nature and of nations, proclaiming the Age of Enlightenment in legal education, temporarily eclipsed the civil law as the basis of legal study and prepared the way for the era of codification. In theory, the adoption of national codes in Prussia (1794), France (1804), Austria (1811), and other countries, and the dissolution of the Empire in 1806, destroyed the common civil law; in fact, however, the codes were a contemporary restatement of recognized doctrine and, chiefly as a result of the influence of the historical school of Savigny, were integrated in the scientific study of law, thereafter still more intensively cultivated in the universities. Thus, on the Continent, instruction in the civil law has been humanistic as well as practical.

In England, the civil law was never formally received in consequence of the early organization of the legal profession and its monopolization of legal training and admission to practice. The result was that the civil law courses offered in the universities and the lectures on the common law later introduced by Blackstone in the eighteenth century for gentlemen as well as lawyers were devoted to the theoretical and historical branches of law, including the classical Roman law, which forms an essential comparative element in the existing English system of legal education. Consequently, in England as on the Continent, theoretical instruction in law is provided by the university, preceding apprenticeship in practice.

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2. This development is reviewed by the writer in the "Introduction" to *Andres Bello, Derecho Romano*, which is to appear in the new official edition of *Bello, Obras Completas*, which is being published by the Venezuelan Government under the editorial direction of Professor Rafael Caldera.

II

This historical setting is valuable in assessing the scene of American legal education. Precisely one hundred years ago, in a notable essay advocating the cultivation of Roman law as a branch of English legal education, Sir Henry Maine remarked on the fact that, after the severance of the United States from the mother country, for a number of years the States admitted by the Federation adopted the common law of England or as received in New England as the standard of decision in the courts in cases not provided for by legislation:

> "But this adherence to a single model ceased about 1825. The State of Louisiana, for a considerable period after it had passed under the dominion of the United States, observed a set of civil rules strangely compounded of English case-law, French code-law, and Spanish usages. The consolidation of this mass of incongruous jurisprudence was determined upon, and after more than one unsuccessful experiment, it was confided to the first legal genius of modern times — Mr. Livingston. Almost unassisted,[3] he produced the Code of Louisiana, of all republications of Roman law the one which appears to us the clearest, the fullest, the most philosophical, and the best adapted to the exigencies of modern society. Now it is this code, and not the Common law of England, which the newest American States are taking for the substratum of their laws. The diffusion of the Code of Louisiana does, in fact, exactly keep step with the extension of the territory of the Federation. And, moreover, it is producing sensible effects on the older American States. But for its success and popularity, we should not probably have had the advantage of watching the greatest experiment which has ever been tried on English jurisprudence — the still-proceeding codification and consolidation of the entire law of New York."[4]

If Sir Henry Maine could be here today, while he doubtless would deplore the tribulations that the experiment in codification launched by David Dudley Field in New York was to encounter, he might well have reflected upon a singular advantage

3. "Mr. Livingston, as is well known, was the sole author of the Criminal Code. In the composition of the Civil Code, he was associated with MM. Derbigny and Moreau Lislet; but the most important chapters, including all those on Contract, are entirely from his pen."

4. *Roman Law and Legal Education*, in CAMBRIDGE ESSAYS (1856), reprinted in VILLAGE-COMMUNITIES IN THE EAST AND WEST, NEW YORK, 360-61 (1889).

of the American legal system, namely, that the Constitution was wisely framed to preserve the integrity of the individual states and, except for matters of federal concern, the law, and in particular legal education, have never been nationalized, thus enabling Louisiana to follow a long civil law tradition of French and Spanish law. And certain it is that he would join in celebrating the golden anniversary of this institution which, allied with its sister schools, has by very necessity led in the comparative study of the civil and common law systems in the United States, participating in a most ambitious — and it must be added a most successful — plan of codification and revision of the laws, organized by the Louisiana State Law Institute, and in its comparative program inviting the admiration of common law jurisdictions to the civil law models of Continental Europe as an essential part of the American heritage.

I have called Sir Henry Maine as a witness, not to testify on the value of instruction in Roman law, which I believe would be as salutary in America as it is in England as a basic element in a proper legal education, nor to advocate the codification of the laws and "incongruous jurisprudence" of other states, which I conceive to be as inevitable as their fecund multiplication, but for the humble purpose of justifying my presence on this program to discuss comparative legal studies in American legal education. Only the kind encouragement of those who have extended me the honor of participating in this program and the reflection that Mr. Livingston, a common lawyer, was able to contribute signally to the civil law of Louisiana, have emboldened me to appear to carry, as it were, a comparative coal from the common law regions to Newcastle. My object simply is to state in brief the need of comparative legal studies as a means both to raise the level of American legal education and to assist in solving the increasingly acute dilemma with which it is faced.

III

In this inquiry, the first concern is the nature of comparative law, which is essentially conditioned, whether in legal theory or from a practical point of view, by the received conception of law. The prevalent trend is to regard law as positive enactment rather than a body of principles inherent in social conduct. For our purposes, three representative theories, widely accepted, may be cited as indicative of the deep-rooted positivism that char-

acterizes legal thinking in this country and elsewhere. The first is the conception of Thomas Hobbes, elaborated by Bentham and more specifically by John Austin early in the nineteenth century, which in modified form still permeates the formal theories of law in England and North America. In this conception, devised by Austin to distinguish the sphere of positive jurisprudence from the moral order, law is the command, or in more modern terms, the imperative directive, of the sovereign conceived as the authority in the state that is habitually obeyed. A century later, the most influential Continental legal philosopher of our time, Hans Kelsen, rediscovered and restated the Austinian conception as the premise of the "pure theory of law," a theory in other words in which law is expressly differentiated, on the one hand, from social facts and, on the other, from moral philosophy. In this theory, law consists of a hierarchy of hypothetical norms or rules, the essential characteristic of which is that they are enforced. A more recent doctrine, derived from the "cynical" legal philosophy given currency in this country by Mr. Justice Holmes, is the local law theory of Walter Wheeler Cook, a theory that has had notable influence in the formation of views respecting conflicts of laws. This theory is in effect that all law and indeed all rights are created by the local territorial sovereign and are to be ascertained through prediction of what the courts in each country will decide in given cases. This exclusive regard for the interests of the forum in which litigation occurs is inferred from the postulate of Holmes that law is a calculated prediction of judicial behavior. In all such positivistic theories, law is regarded as a category of form with undefined content, attributed to or determined by a political sovereign. In consequence, the substance of right depends upon what is enacted or sanctioned.

These commonly accepted notions undoubtedly have persisted as reflections of the optimistic progressivism and relative prosperity of the nineteenth century, which lent credence to the mystic of political sovereignty, as the ultimate repository of authority. This charismatic fixation, reaching a climax in the concept of the socialized welfare state, has been possible in an expanding economy. But legal positivism is also supported, perhaps for the most part unconsciously, by the multiplication of laws, orders, and decisions, necessary to co-ordinate and regulate the complex activities of modern civilization. This "indigestible

heap" of legal materials, as Chancellor Kent characterized the mounting mass of reports in 1826, is subject to constant change and progressive accumulation in volume and technical intricacy. The task of the jurist, who is called upon to read, digest, and apply this vast literature, far exceeding human capacity even to scan, much less to master, thus has become a veritable labor of Sisyphus. It is small wonder that, under such conditions, those engaged in legal study scarcely look beyond the mass of positive law in which they are engrossed and engulfed. Hence, law is identified with legislation and is attributed to the legislative organ by which it is enacted, rather than to the infinitely diversified social structure by which law is required. The tendency therefore is to simplify legal theory by differentiating law from the facts of life, by personalizing the legal process in terms of the agencies by which it is conducted, rather than as a function of the needs of human beings whom they are supposed to serve.

The objections to such relativistic theories seem obvious enough. First, law is divorced from the social and ideological context by which it is conditioned, and no regard is had to the function of law as a means to protect and promote human interests. Second, especially in the formulation of Hans Kelsen, the emphasis upon the sanction as the essential element in law does not explain the many so-called imperfect laws, for which no express means of enforcement is provided and which yet are regarded as binding; many of the most important conventions of the Constitution may be of this nature. Indeed, this position brutally implies that the end of law is to legalize the use of force, irrespective of the consequences. In sum, these positivistic doctrines give no basis to distinguish the most tryrannical acts of a dictator from just or expedient laws, no light to reform the law as it is to meet new conditions. For this reason, positivism in law is acceptable when the existing legislation seems adequate, in times of complacent prosperity; but when the laws are out of joint with the times, or war and revolution express discontent with what government has done, positivism is a hollow response to human need. It denies both justice and progress.

IV

Once this is understood, that it is not enough for legal science merely to digest the ephemeral existing positive laws and that indeed its true object is to find means to determine what laws

are just and expedient to serve human activities, the paramount importance of comparative legal study is clear. In other areas of scientific investigation, it has long since been demonstrated that experimental or comparative observation is essential to attain useful information concerning natural and human phenomena. In the field of law, in view of the infrequent possibility of experimentation, in seeking to discover what is significant, chief reliance must be placed upon comparison of laws in time and space, including consideration of their historic environment and real effects, with the necessary theoretical analysis to define the ends of justice and to discriminate between what is essential and what insignificant or detrimental to the legal order. There is no other way to validate law in an objective manner, nor to distil from past experience rational principles for the solution of new problems. This means in two words that the function of legal science is not merely to index and interpret existing law — its traditional task indispensable for the practical administration of law — but also that it has a scientific mission to establish the criteria of justice, principally through comparative research, which is to say, to define and secure what have been termed policy values.

This also means to surmount the stubborn nationalistic prejudice that, because law is declared by positive enactment, legal science must be local, and to restore the humanistic conception, implicit in the common law, that justice is universal, equally concerned with all mankind without regard to race, creed, or nationality. Indeed, to be worthy of the name, the science of law must presume the essential solidarity of human life — techniques and customs vary, but the problems of law are essentially the same. The notion of a national science of law, however common, is no less preposterous than would be that of a national science of biology or the like; as Ihering once observed, a miserable species of science it were, science degraded to provincial jurisprudence and the scientific boundaries of jurisprudence fixed by political frontiers.

In this connection, it is not our concern to insist upon the place of international legal studies in American legal education, on which we are to be enlightened shortly in the succeeding address. But it may be noted in passing that comparative examination of other legal systems among other things is an indispensable foundation for the study of international legal relations. More-

over, the practical rewards of such comparison are manifold, whether to enrich comprehension of each national law, to provide reciprocal understanding of foreign laws, to establish a basis for the harmonization and unification of particular laws where needed to facilitate international commerce, or as was particularly emphasized by Edouard Lambert, to aid in the formation of constructive legislative policy, which last since the time of the XII Tables has been the most conspicuous practical use of comparative law. And it is to be added in view of the far-flung interests of the United States and their vital significance in war and peace to all our citizens and to the millions in other countries that look to the United States for leadership and protection, that the legal profession, from whose ranks principally come those who are appointed to guide the destinies of the nation, should be competently prepared to do so. On this, another observation of Sir Henry Maine a century ago is pertinent: "[I]t is a downright absurdity that, on the theatre of International affairs," he cautioned, "England should appear by delegates unequipped with the species of knowledge which furnishes the medium of intellectual communication to the other performers on the scene." In sum, whether from a theoretical point of view, or in legal education, or for the evaluation of legislative policy, or even as a basis of international communication and understanding, legal science requires a comparative, international outlook.

V

To implement this conclusion is the immediate task of American legal education. The program envisaged requires extensive reorientation of the present instructional scheme predicated upon massive expansion of comparative legal research. The accomplishment of these objects obviously is incumbent upon our institutions of learning and primarily the law schools. And these, for a variety of historical conditions that I have outlined elsewhere,[5] are faced with an increasingly acute dilemma in their already overcrowded curricula, the dilemma of compromising, under existing notions of legal training, the needs of sufficiently intensive instruction with the ever-expanding detail of positive legislation to be encompassed. It is clear — and I speak not of the law schools of Louisiana, which I gather have progressed

5. *Comparative Legal Research*, 54 MICH. L. REV. 899, 911 *et seq.* (1956).

further than those elsewhere in this country, in consequence of their legal heritage, along comparative lines — that to impose upon the existing law school program, already bursting at the seams, anything like adequate comparative legal instruction and in addition to require a new extensive development of corresponding legal research, will more than aggravate existing difficulties. The fact is that the needs of comparative legal study require radical reconsideration of American legal education as it stands today. These needs are more than a straw to break the camel's back — a more modern vehicle of progress is required.

To explain this, it may be recalled, as indicated at the outset, that in Continental Europe and the British Isles the theoretical and practical aspects of legal education are in effect differentiated. The humanistic and historical branches of law are the concern of the universities; the practical training typically is provided where it can be most efficiently conducted — in practice. In the physical sciences, in medicine, and even in some degree in other disciplines such as engineering, public administration, or social service, to the extent that the vital importance of ongoing research is recognized, there is an analogous demarcation between instruction in the basic sciences and training in their technical application.

In contrast, legal education in the United States today is dominated by the professional conception that the essential function of the law school is to train lawyers for the practice of law. I have no quarrel with this as a principal object of legal education, although there are other public or professional activities to be taken into account, for which legal training is requisite or desirable, and as previously remarked, research as well as instruction is a basic function of legal education. The real question is, however, How and in what subjects is the instruction to be given? And the answer almost universally is that the student should be sufficiently grounded in the traditional nomenclature and especially in what have been characteristically described as the crafts and skills of a lawyer, including especially the technique of litigation. Such matters as the justice or expediency of positive law or its social effects or even the basic factors in its evolution are deemed incidental or even irrelevant in legal training. It is supposed that when the student leaves law school with an impressive diploma, he should be qualified as a member of the profession to engaged in the practice of law. To attain this

vocational objective, there are for practical purposes only three brief years. The number of students constantly grows, introducing in the larger schools problems of mass education, aggravated by deterioration in the prelegal preparation of those who attend law school, over which incidentally there is no real control, and by the problems involved in recruiting the additional instructional staff required with individuals of real intellectual caliber. These difficulties are unnecessarily increased by the usual mode of instruction; the case method, to which we have been too much wedded, is a cumbrous means to enlighten the student in the larger and more significant aspects of social control. Based on hybrid casebooks, it is neither a serious scientific investigation of the sources nor a systematic exposition of the subject matter. However valuable in the hands of a gifted teacher to stimulate student participation and to give facility in case analysis, like all casuistic instruction, it is expensive in time and does not illuminate the essential problems of law by constructive synthesis.

The fundamental difficulty of American legal education, however, is that as law becomes more specialized and technical and the mass of legal matter to be mastered progressively mounts, the basic hypothesis of American legal education that the law schools should turn out complete lawyers in three short years of practical training becomes proportionably impossible. Everyone knows that this is so, that the academic training must be supplemented by a later period of apprenticeship to make a competent lawyer, and that, as specialized branches of law develop, new techniques will be needed by the profession.

Instead of drawing the obvious inference from this state of affairs, the tendency is to crowd out or squeeze supposedly nonvocational subjects to make more room for the practical — taxation, labor law, aviation law, and the like — and especially for technical training in the technical skills involved in litigation, counselling, estate planning, or even law teaching, with the aid of audio-visual and other new devices offered by modern science. But even the liquidation of culture in the curriculum, however complete, does not resolve the difficulty of providing adequate training in all branches of the increasingly specialized and prolific positive law. This dilemma of superficial versus incomplete coverage is directly due to the assumption that legal education is primarily, and if necessary exclusively, to be devoted to the

technical applications of law. Indeed, on this assumption disregarding constant aspects, there can be no solution, for legal education looks to future practice in a changing world.

There have been valiant efforts to liberalize the scheme of American legal education. These are highly significant as evidencing a realization that law should be taught in the grand manner of a learned profession; that those called to such a profession should have some appreciation of the philosophical, historical, social, functional, or comparative significance of the doctrines that they profess, not to speak of their practical effects. But in the existing scheme, such reforms have indeed a hard way to go. In the overcrowded curriculum, there is no real place for such projects, however imperative they may be, except perhaps in a separate program, which a few law students are permitted to attend. This has been the fate of moral philosophy and political science, of the cultural topics relegated to graduate law study, and indeed of almost all matters basically, but not in the eyes of the profession, relevant to the practice of law. And there is no reason to suppose that an adequate development of comparative legal studies can be undertaken in the law school program without reconsideration of its basic vocational fixation.

The chief hope that this may occur — and I have no illusions that such a reform will be soon or easy — is the fact that, for all the jettisoning of humanistic instruction from the curriculum, it still does not provide a sufficient vocational training. Some day perhaps someone will discover that in such a dilemma the solution is not to add more of what has proved inadequate; that preparation for legal practice apparently requires more than practical instruction, which indeed is more efficiently absorbed after law school. If there be doubt about this, it is worth recalling that the two chief legal systems, the Roman and the English, were created by jurists who never went to law school. And above all that, in a university, it is incongruous and most inexpedient to treat the profession of law, to which the nation looks for leadership in national and international affairs, as but a trade.

VI

There is no royal road to learning, certainly not in law. But we may at least try to move in the right direction. It gives small comfort in the present connection to reflect that the vocational

conception which is the chief source of present difficulties in legal education in the United States was initially due, it would seem, to the influence of outstanding jurists, who fully appreciated the larger, and particularly the comparative, aspects of legal science, but who were primarily concerned to ensure the success of their programs. Whether or not a hundred years ago it was necessary to restrict such programs to a minimum in time and in vocational content in order to attract students, as was doubtless the case, the fact that what they started has lived to flourish after them in our great law schools does not answer the problems of today. The times have changed, and in a law school supported by a university it should no longer be necessary to hitch legal education directly to what is in the last analysis a profit motive. Indeed, in the long run a vital program invites more students and increased income from tuition. Consequently, it is feasible to reconsider the objectives of legal education in the United States, including specifically the requisite qualifications for legal practice in the modern world, based upon intelligent understanding of foreign as well as domestic law and affairs.

As the ground for such reconsideration, I have proposed that our university law schools should be devoted to instruction and research in law in the manner of a university, or in other words to comparative legal science.[6] The reasons for the proposal are: first, that in any event there is a critical need to provide more effective training as respects both subject matter and methods of instruction, which paradoxically may well require more time for necessary preparation but nevertheless cannot justly postpone admission to practice except as a last resort; and second, that comparative reorientation of law school objectives is indispensable, both from a scientific viewpoint and as a suitable basis to examine the critical and multiple problems of the legal and social order. It is obvious that these ends cannot be accomplished by the simple addition of an expensive new program alongside or on top of the existing curriculum. If, however, we are prepared to consider the experience of European legal education or even of other branches of university study, to focus the function of the law school at a university level on general theory instead of technical detail, the path to a solution that will serve the high responsibilities of the legal profession becomes visible. This is in

6. *Id.* especially at 919 *et seq.*

brief to ensure that admission to law school is preceded by appropriate prelegal preparation in languages and the humanities, to concentrate law school instruction upon the basic comparative aspects of legal science, and to provide such supplementary training in specialized practice as may be needed on an "in service" basis after graduation.

The reactions to this proposal, set forth in more detail a year ago, have been unexpectedly sympathetic, except for one pointed letter from a recent Michigan graduate, who stated that he had elected to follow the law as a means of livelihood after careful computation of the cost of a legal education as compared with other disciplines and that he objected to any proposal which would upset such computation! However, some of those who apparently approved in principle also opined that certain of such innovations would take a long time, and, of course, there is no way of knowing how many objected but politely refrained from saying so. To those who were silent, there is no response. But on the implication that the idea of such comparative reorientation of legal studies in the United States is unrealistic or should be postponed to the Greek calends, it may be observed that this, if true — a prospect on which one should not be too sanguine — will be because of the presuppositions and engrained conceptions to be overcome. Once it is understood that the immediate task confronting the university law schools in this country is the adequate development of comparative legal science as the basis of legal instruction and research, these pale casts of thought will fade away, and the challenge to realize a reform of immediate and basic significance in legal education will be accepted with constructive resolution. Nothing less will answer the imperative needs of the legal profession, nor of the public whose destinies so largely are in their hands in the world today.