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A Common Lawyer Looks at the Civil Law

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with him a conviction that the Court should not and could not clash too often and too harshly with the will of the public. This conviction is frankly displayed in his lectures by way of criticism of the so-called "judicial activists," and in a tendency to weigh the Bill of Rights against the apparent desires of the majority. Yet the Justice felt as strongly as any man about freedom, as a series of his opinions and these lectures show. So there is presented a picture of a man who, as a private citizen, would have supported and defended nearly every opinion expressed by Mr. O'Brian; but who, as a Justice of the Supreme Court, might have felt compelled to rule against his own beliefs. His book is a compelling expression of the consistent philosophy which produces such a judicial dilemma.

It may indeed be that the philosophy represented by Mr. Justice Jackson's book lies behind the most recent actions of the Supreme Court in the area of civil liberties and particularly on the problem of the security program. Certainly *Peters v. Hobby*,[2] and other decisions handed down in the Term following Mr. Justice Jackson's death, represent a backing-away from the necessary clash between individual conviction and judicial philosophy where the security program and other civil liberties are involved. Looking at these two books, it is easy to suggest that Mr. O'Brian's lectures represent the individual convictions of a majority of the Court, while Mr. Justice Jackson's lectures speak in a rough way for the prevailing judicial philosophy. A constitutional lawyer could do worse than read the two books together for a taste of the resultant burdens of constitutional adjudication.

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A COMMON LAWYER LOOKS AT THE CIVIL LAW. By F. H. Lawson. Foreword by Hessel E. Yntema. Ann Arbor: University of Michigan Press. 1955. xx + 216 pages. $4.00.

Common Law and Civil Law are the two great legal systems of the modern world. While the Common Law can roughly be said to prevail in the English-speaking countries, the Civil Law constitutes that group of laws which are in effect on the Continent of Europe, in Latin America and in those parts of Asia and Africa

2. 349 U.S. 331 (1954).

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which, like Japan, Indonesia, French North Africa or the Union of South Africa, have derived or received their legal systems from some country of continental Europe. Within each of these two groups we find much variety. Within the Civil Law group the differences are greater than within the Common Law group. French law differs from German or Swiss law more than, let us say, the law of England from that of California, New Zealand or India. But when we compare with one another English, American, German and French laws, it is clear that the two former belong to one group and the two latter to another. An American and an English lawyer can easily understand each other; it is also not too difficult for an Italian and an Austrian lawyer to carry on a legal conversation, but it is hard for a lawyer from Mexico and one from the United States to carry on a meaningful legal discourse even if they both use and understand the same language.

What is the reason for this dualism of legal systems and in what respects do they differ? These questions have attracted many observant minds, from St. Germain in his *Doctor and Student* to the fairly large number of authors who have dealt with them in recent times. The question of why there are just the two groups can be more easily answered than the inquiry as to what are the distinctive characteristics. The features which are common within each of the two systems can be traced to common origins. All the laws of the Common Law group originated in that law which was developed by the royal courts of England at Westminster. All the laws constituting the Civil Law group have incorporated in them large ingredients of the law of ancient Rome. Civil Law is not identical with Roman law, but all the legal orders belonging to it have been decisively influenced by Roman law.

In this book in which he has undertaken to open up a general view of the Civil Law to Common Law lawyers, the Professor of Comparative Law at Oxford University thus uses Roman law as the means of access to the mysteries of the Civil Law. This access is not the only possible one. Indeed, in order to be treated as such the presentation of Roman law must be either extremely broad and general, or extremely brief and limited to one single phase of its long development, *viz.*, that of the Corpus Iuris of the sixth century A.D. Although such an approach can give but a cursory impression of the complicated structure of Roman law, Professor Lawson's book proves how fruitful it can be as an access to those

parts of the Civil Law in which the influence of Roman law has been most conspicuous, *i.e.*, the law of contracts, torts and movable property. With masterly competency, perspicacity and brevity Lawson gives a bird's-eye view of those features of the Roman law of the Corpus Iuris which entered into the Civil Law upon its rediscovery in the twelfth century, the transformations they have undergone since and the forms in which they appear in modern French and German law. In the last chapter he adds a concise presentation of those peculiar institutions of the Civil Law which have not come under the sway of Roman law, *i.e.*, the law of the family and of succession upon death.

Upon such a simple plan Lawson succeeds in the seemingly impossible task of presenting in 210 pages a coherent picture of the essential features of the Civil Law which not only constitutes the finest introduction presently existing for the uninitiated, but also opens up challenges and new vistas to at least one reader who has spent many years in working with Civil Law institutions.

A few years ago, when Mr. Lawson was in this country, he talked informally to our students in Chicago about the distinctive features of English law and its administration. It was sheer pleasure to watch him present those aspects of his country's legal system which lie below the surface, are not described in books and yet are determinative of that unique atmosphere of the law of England of which John Galsworthy once said that it was characterized by its smell of fine old cheese. Whatever constitutes the imponderables of English law, they were made palpable by the speaker, himself a living embodiment of the English Common Law. That same "nose" for the hidden essential is shown by him in his Cooley lectures on the Civil Law, the vividness and liveliness of which has been preserved on the printed page.

Lawson properly asserts that, frequent statements to the contrary notwithstanding, neither codification nor the absence of an official doctrine of stare decisis essentially differentiate the Civil Law from the Common Law. Private law has been codified in Common Law jurisdictions, such as California or India, and has been left uncodified in Civil Law jurisdictions, such as Scotland, South Africa or Hungary. The force of precedent, while theoretically different in the two systems, has practically come to be much the same. Differences still existing in this respect are greater among Civil Law countries themselves than between the United States and

France. In Germany, where the author seems to believe that the force of precedent is not quite so strong as in France, it has been held that a conveyancing counsel is liable to his client for overlooking not only a relevant provision of a code or statute but also a pertinent case. The recognition of the effect of precedent has not gone farther in any Common Law country.

Lawson finds equally untenable the often made statement that in its method the Common Law is inductive and the Civil Law deductive. If these words are to have any meaning, they can only signify that in one system the courts are said to present their decisions as being derived from general rules while in the other they are not so presented. Such a distinction is palpably wrong, because Common Law judges are as anxious as their Civil Law brethren to present their decisions as being necessarily required by some rule of a scope broader than that of the single case. What then are the distinctive elements of the two great systems? They are found by Lawson to subsist in subtle traits of internal structure.

The Civil Law is a more "literary" law than the Common Law. It is a law of the books. At its source stands a book to which authority was ascribed by the medieval lawyers, the Corpus Iuris of Emperor Justinian. But this sixth-century compilation of the works of jurists and emperors of much earlier times could not be directly applied to the problems of the twelfth and later centuries without the interpretative and transforming activity of law teachers and scholarly writers. The primary cultivators of the Civil Law were the institutional writers, without whose works the codes would not have been possible. As the French Code of 1804 was based upon the writings of Pothier, so was the German Code of 1896 based on those of Windscheid. In his comprehensive way Max Weber has shown how the characteristics of a legal system are determined by the type of men by whom it is primarily cultivated.[1] The traits of a law dominated by theologians are much the same irrespective of whether these theologians are Mohammedan muftis, Jewish rabbis or Hindu priests. A law dominated by judges who have to deal with isolated problems as they happen to come before them in court is different from one which is shaped by teachers and scholars who have to present a major topic coherently and systematically, and who have the time and inclination to expend mental energy on the elaboration of a set of conceptual tools

1. WEBER, LAW IN ECONOMY AND SOCIETY c. 7 (Rheinstein ed. 1954).

to be framed with acuity and applied so to speak as the alphabet of the legal "system." Apparently without being acquainted with Weber's theory of "legal *honoratiores*" Lawson derives much the same insights from his comparison of Common Law and Civil Law. The characteristics of the former are those of a law dominated by judges, of the latter those of a law dominated by scholars. What gives the Civil Law its peculiar flavor is its systematic nature and the concern of its cultivators not only with problems which have already come before the courts but also with those which have not yet arisen in practice but have been visualized in advance by scholarly foresight. Also there are the scholarly tendencies toward generalization and looking upon the law as a system of substantive rights rather than as a set of procedural actions. How by these trends the Roman law of contractual and delictual actions was transformed into a well-structured system of a law of obligations and legal transactions is beautifully sketched by Professor Lawson.

To the puzzling question of why it was that the Common Law came to be dominated by judges and the Civil Law by scholars, the answer is more intimated than stated in our book. Due to its peculiar political development, the administration of English law came to be centralized in one set of courts, around which a strongly organized and politically powerful bar could develop. In all the countries of the Continent the administration of justice was distributed over a large number of courts, none of which was sufficiently strong to dominate over the others and to serve as a center for the development of a powerfully organized legal profession. The indispensable unifying element was constituted by the university law schools, which as to both their faculties and student bodies long maintained a supra-local character. The prestige which in England attached to the judges of the central courts was on the Continent accorded to the members of the community of scholars. A clear insight into this phenomenon not only goes far to explain the traditional differences between Common Law and Civil Law but also to allow predictions as to the consequences which are likely to follow from the establishment of strong central supreme courts in the continental nations and the absence of a general supreme court of law and equity in the United States. While on the Continent the law has come to assume the features of a judge-made law perhaps even more than Lawson is inclined

to recognize, American law has to a considerable extent begun to present the characteristics of a system in which the work of academic scholars has come to be influential.

While Lawson is eloquent on the scholar's role in the shaping of the Civil Law, he has less to say on the activities of another group of men who have been influential in the Civil Law world, *viz.*, the members of the high civil service. It was with the training of skilled administrators that the continental universities have been vitally concerned for centuries. It was, indeed, the need of a staff of trained civil servants which to a large extent caused Renaissance princes to establish universities. But not only was legal education geared to the needs of the civil service, the civil servants also took a decisive hand in the shaping of the law. Their predilection for rationality and uniformity was among those forces which drove toward codification. They were to a large extent responsible for the partial codification of French law under Chancellor Daguesseau and Minister Colbert as well as for the ultimate codification under that archbureaucrat, the First Consul. It was largely at the urging of the civil service that the laws were codified—which meant primarily, unified—in Prussia (1791–94) and Austria (1811) and, even earlier, in the Scandinavian countries (Denmark 1683, Norway 1687, Sweden-Finland 1734). The laws of these latter countries are not regarded by Lawson as belonging to the conspectus of the Civil Law. They may, indeed, be said to form a group of their own. The Roman law influence was weaker in these countries than in their neighbors to the south. But it has not been absent; in elaborating the laws of these Scandinavian countries both bureaucrats and scholars have played decisive roles, and both groups' training was deeply influenced by the natural law and Pandectist scholars of Germany.

To comparativists the Scandinavian laws are still largely *terra incognita.* Better acquaintance with them might go far in further elucidating the characteristics of a legal system in which native popular traditions seem to have entered into a peculiarly happy combination with the conceptualism and systematism of the scholars, the urge for rationality and uniformity of the enlightened bureaucrats and the reforming modernism of a socially alert, liberal citizenry. Acquaintance with these laws also might help us better to recognize two distinctive features of the Civil Law systems, especially their Germanic variants, *viz.*, their modernity and

their consistency in the implementation of considerations of social policy.

The unbroken continuity of the development of the Common Law has resulted in the preservation of quite a few rules and institutions of venerable antiquity but doubtful compatibility with twentieth-century needs. In the Civil Law the continuity of development has been broken several times. Not only in the codifications of the sixth and the nineteenth and twentieth centuries, but also in the sequence of successive schools of learning, repeated opportunities were presented for taking stock and the elimination of what had become obsolete. Such codes as those of Switzerland and Germany are eminently modern, and in France and the Netherlands a thorough overhauling of their obsolescent codes is now in progress. Also, and here again we meet the role of the civil service, in the ministries of justice special bureaus have been established whose highly skilled staff members are to observe current economic and social developments and, in co-operation with interested groups and legislative bodies, suggest and draft such amendments of the law as are indicated by new needs. In the United States, this task has just begun to be recognized and for its performance a few states have established special agencies such as the law revision commissions of New York and California or the Louisiana Law Institute. These developments may be indicative of that same incipient trend which is evidenced by the rising influence of scholarly treatises and law review articles.

In his portrayal of the Civil Law Professor Lawson proves himself to be completely at home in the legal system of France. He is also admirably well acquainted with that of Germany although he is not so perfectly at home in it. Perhaps as an Englishman he feels a greater sympathy for the law of that country which was Britain's ally in two wars than for that of the country which was the enemy. Perhaps he is also too much of an artist to be attracted by what he seems to feel as an exaggerated trend toward conceptualization and systematization in the law of Germany. Such a trend was certainly operative in the years of the making of the Civil Code and the first decades of its application. But a marked shift of legal method has been observable in Germany since the 1920's. Due to the combination of catastrophic political, social and economic upheavals with the rise of comparative law and sociological jurisprudence, German law has begun to undergo a

far-reaching transformation. This process has expressed itself less in changes of the legal rules and institutions, which, as a matter of fact, have presented a remarkable measure of stability, than in a greater nearness to life of legal thought and, consequently, a shift from the old jurisprudence of concepts to a new jurisprudence of interests.

In a fascinating passage Lawson speculates about the reason for the absence in the Civil Law of the institution of the trust which is being put to such a vast variety of uses in the Common Law. He seems to find it in an alleged aversion of the Civil Law mind to a concept which cannot be classified in either of the two clear-cut categories of right in rem and right in personam. He also believes that the connection of the trust with that dualism of law and equity which has no counterpart in the Civil Law has been standing in the way of its adoption. Such considerations have undoubtedly played a certain role. But the main reason seems to me to lie in the fact that for most, if not all, of the needs which are satisfied in the Common Law by means of the general device of the trust, the various systems of the Civil Law place at the public's disposal a series of institutions of limited but specialized scope. In the law of Germany the catalogue of such special institutions is extensive. "Successive heirship"[2] and "successive legacy"[3] are available as special devices for the achievement of the purposes of the testamentary trust, especially when they are combined with executorship, which as established by the German Code[4] lends itself more readily to long-term purposes than the executorship of the Common Law type. Also guardianship of the estate of a minor or an incompetent is so organized that the public does not feel that urge to avoid it which is felt in the United States. For the anticipation of succession by means of inter vivos gifts subject to trusts of one kind or another the German tax laws do not seem to provide much incentive. The ends of a charitable trust can be achieved by means of the "foundation,"[5] and where the Common Law resorts to the trust in order to keep a club going, under the German Code resort can be had to the *eingetragener Verein*.[6] Trusteeship for the protection of debenture holders is regulated by statute as a special

2. *Nacherbschaft*: BÜRGERLICHES GESETZBUCH §§ 2100–46.
3. *Nachvermächtnis*: *Id.* § 2191.
4. *Id.* §§ 2197–2228.
5. *Stiftung*: *Id.* §§ 80–88.
6. *Id.* §§ 21–79.

institution.[7] The purposes of a voting trust can be achieved by means of proxies. For the purposes of the management trust and similar needs the banks provide well-established services through custodian accounts and other devices, just as a number of special devices are available for those purposes for which the trust is occasionally used as a means to secure a credit. There is thus little need for the trust as a general institution. Lawson contrasts the Civil Law tendency toward generalization with the Common Law predilection for the elaboration of special rules and special devices designed to take care of purposes of limited scope. In the case of the trust, the very opposite holds true. In the Common Law the trust has been developed as a general institution, which can be used for a great variety of different purposes, while German law has preferred the elaboration of a set of special devices of narrower scopes. Each one of these devices appears to be so well adapted to its peculiar purpose that in many cases a simple reference suffices where in an American transaction the draftsman has to spell out at great length those special clauses which he needs in order to make the general trust device serve his particular purpose.

It is among the special merits of Professor Lawson's book that it is thought-provoking and challenging. It has challenged the present reviewer to those observations which he has just stated. A book of this kind cannot be "complete," but it can open up horizons, whet the reader's appetite for more and lead him to an understanding of the fact that the two great systems of modern law are different and the respects in which they differ. Of course, amidst all the differences we must not lose sight of the similarities. The statement may well be ventured that for some eighty percent of all the problems of private law which arise in modern life it makes no difference whether they are submitted for decision to a court in one country or another. In ten percent the differences of outcome will be due to accidental circumstances, and only in the remaining ten percent to divergencies of national policies or traditions. Insofar as we are concerned with the relationships between free men in a society engaging in large scale commerce and industry, the problems are the same and the values by which

7. Law (Concerning the Common Rights of Debenture Holders) of Dec. 4, 1899, [1899] REICHSGESETZBLATT 691 (Germany), as amended by Law of May 14, 1914, [1914] REICHSGESETZBLATT 121, Decree of Sept. 24, 1932, [1932] REICHSGESETZBLATT pt. 1, at 447 and Law of July 20, 1933, [1933] REICHSGESETZBLATT pt. 1, at 523.

we solve them have their roots in that Great Tradition which is common to the entire western world. What is different is thus not so much the solutions which are reached by the courts of Civil Law and Common Law countries as the mental processes by which they are reached. These differences are significant indeed. We must learn to understand them. For such a purpose Professor Lawson's book is of great help. No lawyer who aspires to being educated should miss it. He will obtain from it a rich harvest of knowledge and insight as well as the pleasure which one derives from a work of literary art.

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THE AMERICAN LAWYER: A SUMMARY OF THE SURVEY OF THE LEGAL PROFESSION. By Albert P. Blaustein and Charles O. Porter with Charles T. Duncan. Chicago: University of Chicago Press. 1954. xiii + 360 pages. $5.50.

This volume is a careful summary of fact, based upon the several volumes and numerous reports of the Survey of the Legal Profession. That it is less a study than a compendium is unfortunate, for in more imaginative and more critical hands, the materials available could undoubtedly have become a provocative landmark of professional self-analysis. As it stands, it is useful.

In it one comes upon sequences of semi-detached factual episodes concerning the number and distribution of legal practitioners, their average incomes, the sizes of their firms, various public services which lawyers perform, sundry details of the legal and other types of education. And many more. It is certain that lawyers in training and in practice will find in the volume a convenient portrayal of carefully found-out facts and figures about their chosen profession. Those interested in the sociology of the professions, however, must treat the volume carefully, as a sort of data book. For even as description, although informative, it is flat. The meanings that are here have not been extracted by analysis.

What I mean is readily illustrated by the following: We are given a remarkably neat statistical table which reveals that median

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