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CASES — TEXT — MATERIALS

SCHLESINGER'S  
**COMPARATIVE LAW**

SEVENTH EDITION

*by*

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*To the memory of*  
**RUDOLF BERTHOLD SCHLESINGER**  
*1909–1996*

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## PREFACE

It is with a profound sense of both humility and pride that we write this preface to the seventh edition of R.B. Schlesinger's *Comparative Law*. This was not only the first and leading casebook on the subject in the United States for the past sixty years, but it is also known and cited worldwide more than any other American casebook in any field and more than any other comparative law book published anywhere. Indeed, "the Schlesinger" is the almost casual product of a towering twentieth-century intellectual, a man of a stupendous range of knowledge, humanity, and brilliance who, like many others before World War II, came to the United States to escape Nazi brutality.

Schlesinger left Germany in 1933 as a fully formed German lawyer and legal scholar. Upon arriving in the United States, he taught himself English, obtained a new U.S. legal education at Columbia Law School (where he was the first and quite likely the only non-native Editor in Chief of the *Columbia Law Review*), and (after the usual U.S. practicing *cursus honorum*) he accepted a teaching job at Cornell Law School. The first edition of this book, published in 1950, consisted of the teaching materials of the young German comparative law professor. One of Schlesinger's colleagues had given them to an editor at Foundation Press who was visiting at Cornell when Schlesinger happened to be out of town. In fact, Schlesinger came to know of the book only when, to his surprise, he received the proofs in the mail.<sup>1</sup> Schlesinger attended alone to several subsequent editions, which were published roughly every ten years. For the fifth edition (1988), he was joined by a distinguished team of co-authors: Hans Baade (Texas), Mirjan Damaška (Yale), and Peter Herzog (Syracuse). For the sixth edition (1998), Damaška left the team and was substituted by Edward Wise (Wayne State), while Schlesinger himself still remained an active lead author. Unfortunately, he never saw the final edition, because in 1996 he left this world together with his beloved lifetime companion, Puti.

The honor and responsibility to keep the book alive was bestowed by Schlesinger himself on Ugo Mattei, a former student and successor to the Chair of Comparative Law that Schlesinger held at the Hastings College of the Law at the time of his death. The project for this edition was initiated under the leadership of Hans Baade, early in 2000. Meanwhile, Ed Wise died prematurely and Baade and Herzog decided not to be involved in the project any more. Subsequently, Teemu Ruskola and Antonio Gidi (who took care of civil procedure) joined the team. Through a process of acce-

1. The story is told in the posthumously published R.B. Schlesinger, *Memoir* (Ugo Mattei & Andrea Pradi eds.2000).

tion, the Schlesinger has grown considerably over time, incorporating new work with each edition. The new team owes their first and greatest debt to their predecessors. Without their work, this book could never have been kept alive.

The philosophy of this seventh edition is best described as an apparently radical departure that belies a deeper intellectual continuity. The world and the scholarly community have changed enormously not only from 1950, which is obvious, but also in the intervening years since the publication of the sixth edition, which have witnessed unprecedented historical and intellectual transformations worldwide. (The fifth edition was published one year before the fall of the Berlin Wall). When the sixth edition was written, self-congratulatory Western “rule of law” rhetoric was at its peak. The Cold War, the onset of which had coincided with the publication of the first edition, was finally over, and the category of “socialist law” was fast disappearing from comparative legal scholarship. Questions regarding the convergence versus divergence of civil law and common law again occupied the center stage. Fortunately, the Schlesinger did not go as far in this direction as other dominant books in the field (e.g. Zweigert & Kötz), yet it too reflected the intellectual climate in which it was produced. During this same period, there emerged a younger cohort of scholars with interests beyond the traditional comparison between continental Europe and the United States. Again, it might have been because of the economic rise of Asia and the relative decline of Europe, but there was an increasing sense of urgency that a broader perspective is needed and that non-Western legal knowledge needs to be integrated with the mainstream study of comparative law, rather than segregating it in Area Studies or under the notion of “radically different cultures.”

At the same time, with accelerating globalization the state was losing its centrality as the main producer and repository of law, and the structural linkage between law, sovereignty, and statehood was questioned even within the mainstream legal scholarship. Comparative lawyers were well aware of both supranational and subnational producers of law and of the need to incorporate them in a comparative framework. Meanwhile, post-9/11 legal transformations in the United States, Europe and the Middle East put tremendous stress on the rule of law in the West, yet they also provoked greater scholarly interest in understanding Islam and the legal experiences of the global South.

Some important conferences have been convened, and some important articles, monographs and even a few textbooks have been published that seek to take account of these various developments and their significance for the mainstream of comparative law. But the new editions of various comparative law casebooks, which remain crucial as the first introduction for most U.S. students to the subject, have remained largely unchanged as far as their basic organization and orientation are concerned. This is simply no longer tenable. In adapting the Schlesinger to the new circumstances of the twenty-first century, we have sought to return to the book’s original

philosophy. Given that from its inception the book has tended to focus on comparing the legal systems of various Western states, this may sound somewhat paradoxical.

The first edition of the Schlesinger was an extraordinary reflection of the state of the world at the time. Most fundamentally, it was motivated by a desire to re-open a vital dialogue between Europe and the United States, in order to re-establish a notion of international legality in the aftermath of the catastrophe of World War II. It also provided comparative law with an important first interpretation of legal realism, the most advanced scholarly paradigm of the time which gave the United States a considerable worldwide advantage. In this edition we went back to the principles of the original book. How would R.B Schlesinger have written his casebook today? His work always arose out of teaching which in turn focused on key legal transformations. Today, this means paying considerable attention to the East and the South as well to the changing sources of the law. Insofar as Schlesinger sought to open a dialogue where it was most urgent, today that means turning toward China and the Islamic world, most notably. And honoring Schlesinger's desire to incorporate cutting edge scholarship and new methods translates today to the adoption of a multi-disciplinary perspective that goes beyond the old state-centered paradigm.

We have sought to accomplish all of this, even though our intellectual capacities fall far short of those of R.B. Schlesinger. We have adopted the original three part structure of the first edition, with its first part devoted to method, its second part to sources and its third to in-depth study of specific issues. We have re-envisioned and "globalized" the first and the second parts of the book as much as possible. The third part now includes the dialogue on procedure with Comparovich (not included in the first edition) adapted by Professor Gidi. It now reflects more faithfully the early evolution of the case book, with some new materials on China and Islamic law.

In the ten-plus years during which the lead author has collected materials to set up the team and follow new developments, many generations of Hastings students have been involved directly or indirectly in this project. The lead author was a student at Hastings when the fifth edition first came out and he has taught for fifteen years from the fifth and sixth editions, even as they were growing increasingly obsolete. Thanks to students and their feedback, various organizational issues became evident. Important contributions came from Claire Harvey, Vanina Shakutrukul, Boris Mamlyuk, Cosmos Eubani, Saki Bailey, Avi Singh, Jacob Linetsky, Brian Walsh, Regina Burch, and many others.

When the final drafting took place, a team of Hastings students provided crucial assistance. Leah Price, Yuan Feng, Dong Ho Yoo, Joshua Horowitz, Wendy Yang, James Dallal, Candice Hyton, Matthew Haluk, and Mattew Watts all provided us with hours and hours of volunteer help. Without their help and friendship this edition would not have been possible.

Various scholars and friends were also kind enough to read portions of the manuscript as well as to provide suggestions, updates, and other help (without of course bearing responsibility for the inevitable flaws of the final product). Among them we thank especially Abdullahi An-na'im, David Bederman, Luisa Antonioli, Mauro Bussani, David L. Eng, Ahmed Feiz, Martha Fineman, Francesca Fiorentini, Elisabetta Grande, Michele Graziadei, Marta Infantino, Luca Pes, Mathias Reimann, Kim Lane Scheppele, and Tibor Varady. We have discussed the project with Ralph Michaels and Franz Werro whom we also wish to thank.

Antonio Gidi has edited and adapted the entire part related to civil procedure: Chapter 6 (sections 3 and 4); Chapter 7 (section 8); Chapter 8 (sections 1, 2, 3). He wishes to thank Professor Stefaan Voet for his invaluable suggestions. He also wishes to thank Sebastien Chain, Florian Zweifel, and Charlotte Simon.

Ugo Mattei and Teemu Ruskola share responsibility for the rest.

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Airali, (Turin)  
January 26, 2009

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January 28, 2009

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## **INSTRUCTOR'S NOTE**

### **A MESSAGE TO PROSPECTIVE TEACHERS USING THE SCHLESINGER**

Because comparative law is a subject in rapid transformation and because it has no objective canon or subject matter we need to spend a few words on the fundamental logic of the Schlesinger. We kept this logic that provides a framework within which every teacher should be able to interpret the discipline according to her own disposition.

The book is divided in three parts.

The first has two main purposes: a) setting the scene of the “legal world” that the student of comparative law has to explore in her own historical time; b) offering a reliable professional toolkit that the tradition of comparative law has produced in order to offer her a way to begin the “understanding” of such legal world. The first chapter is devoted to the first task and should allow the instructor to offer to the students a map of the current challenges that a non-formalistic and non-parochial approach to the law must meet. The second chapter keeps insisting on the first aim but also begins the exploration of our professional toolkit. The student will take home a sense of complexity and relativism but also a feeling that some fundamental understanding based on problems and questions asked is possible. The third chapter again offers a picture of how the law is in the interconnected world and explores some special methodological developments that should give to the comparative lawyer an “advantage” in approaching complexity.

The second part starts from the assumption that comparative law is the best approach to handle fundamental institutional settings, those that are not going to be changed with the strike of a legislator’s pen. It thus has two main purposes: a) offering to the student a deep sense of continuity through time and space of that fundamental human experience called “the law”; b) making him familiar with the sources of law seen as a deeply rooted and culturally specific depository of knowledge that legal systems accumulate in the unfolding of their experience. This is why the chapters are devoted to the history (Chapter 4) and to the two most fundamental sources of the professional legal experience: legislation (Chapter 5) and case law (Chapter 6). The instructor should lead the student in a fascinating intellectual journey through time and space allowing her both to experience the uniqueness of her own system and the fundamental cultural and intellectual debt that her system has contracted with “the other”.

Also the third part that is devoted to topics has a foundational ambition. In picking the organization of the legal profession (Chapter 7), procedure (Chapter 8) and a selection of fundamental private law issues



(Chapter 9), it approaches areas that could not be more central to the very way in which lawyers think and thus contribute to developing their own professional culture. All the topics are approached with a historical and comparative method and the main purpose is, again as it was in the first edition of this book, to give to the student that modicum of understanding of the technical peculiarities of the foreign legal experience (and of consciousness of her own) that will allow her to intelligently communicate with colleagues that have been trained outside of the United States.

No course of comparative law can possibly cover this entire book. A usual three-unit course on comparative law can reasonably cover with appropriate discussion approximately two-thirds of it. According to their personal sensibilities, teachers can easily choose any two of the three parts, each of which consists of three chapters (as in the original). For example, more traditionally inclined colleagues may wish to skip Part I and devote their efforts to Parts II and III (in whole or in part). Others might approach Parts I and II. But any combination should work. All chapters are self-contained and can be assigned separately in whatever order the teacher prefers to proceed. Only Chapter 6 (Sections 3 and 4) and 7 (Section 8) should be assigned before Chapter 8 for colleagues that are keen on putting procedure at the center of the stage.

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