COLUMBIA
LAW REVIEW

VOL. XXI NOVEMBER, 1921 NO. 7

COMPARATIVE PUBLIC LAW AND THE FUNDAMENTALS OF ITS STUDY[1]

To justify the study of comparative public law will not be more difficult than to prove the proverbial pudding. There *are* books on comparative public law.[2] Recourse to them is being had every day in the discussion of important public problems.[3] Ready examples will be found in the decisions of the courts of the United States,[4] of the British Em-

[1] The body of this article is based on the first few of the lectures delivered at the University of California in spring, 1917, and again, in a larger scope, in the fall of 1919, in a course entitled "Comparative Public Law." The writer wishes to express his profound obligation to his friend, Mr. Preston Lockwood, of the Columbia School of Journalism, formerly of Exeter College, Oxford, for his generous help in revising the article for publication.

[2] Goodnow, *Comparative Administrative Law* (1893); Esmein, *Éléments de Droit Constitutionnel français et comparé* (6th ed. 1914). More limited in scope, but no less important in effect, Dicey, *Law of the Constitution* (8th ed. 1915) esp. ch. II, III, XII, and parts of the Appendix and the Introduction; Posada, *Tratado de Derecho Político,* (1894) II *Derecho Constitucional Comparado. Cf. e. g.* Laferrière, *Traité de la Juridiction Administrative* (2d ed. 1896), I. 26-136. The British Empire itself suggests a wide field of comparison between the several commonwealths; *cf.* Keith's works, esp. *Responsible Government in the Dominions* (1912). A great part of the work on American constitutional law and its sources is really a study of comparative public law. As to periodicals, *cf.* esp. *Revue de Droit Public, Revue Politique et Parlementaire,* etc.

[3] Examples: The *Federalist;* modern discussions of budget arrangements and of the European and New Zealand social insurance laws; *cf.* González, *Manual de la constitución argentina* (8th ed.) 18-21.

[4] Said Mr. Justice Wilson, one of the greatest lawyers of his day, a man whose contribution to legal and political theory has by no means been sufficiently appreciated: " . . . A cause so conspicuous and interesting, should be carefully and accurately viewed from every possible point of sight. I shall examine it, 1st, by the principles of general jurisprudence, 2d, by the laws and practice of particular States and *Kingdoms* . . . 3rdly, and chiefly, . . . by the Constitution of the *United States* . . . ." *Chisholm v. Georgia* (U. S. 1793) 2 Dal. 419, 543. That the judgment was disapproved of and gave rise to the Eleventh Amendment does not lessen its value; noted jurists are now demanding a return to the principles which actuated the majority of the court, Mr. Justice Wilson among them. See also *United States* v. *Lee* (1882) 106 U. S. 196, 204-6, 208-9, 221, 227, 1 Sup. Ct. 240; *Worcester* v. *Georgia* (U. S. 1832) 6 Pet. 515, 551-3; *Bliss* v. *Lawrence* (1874) 58 N. Y. 442, 450, per Johnson, *J.*: "We do not understand that the English decisions really rest on any grounds peculiar to that country, although some times expressed in terms which we might not select to express our views of the true foundation of the doctrine in question. The substance of it all is, the necessity of maintaining the efficiency of the public service by seeing to it that public salaries really go to

pire,[5] of Continental Europe,[6] as well as in the works of writers of authority.[7] Relations between the different parts of the world have grown closer since the eighteenth century. If the framers of the Constitu-

---

those who perform the public service. To this extent, we think, the public policy of every country must go to secure the end in view." Sometimes the reference is wrong, but this does not lessen the importance of the principle. Thus Mr. Chief Justice Taney, said in *Beers* v. *Arkansas* (U. S. 1857) 20 How. 527, 529: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts . . . without its consent and permission." The conception of "civilized nations" may of course be given more or less narrow limits; but the statement of the learned judge is not true outside the English-speaking world. *Cf. infra,* footnote 15, where Italian authorities speak of civilized governments as adhering to precisely the opposite point of view.

[5] *E. g.* the Australian application of *McCulloch v. Maryland* (U. S. 1819) 4 Wheat. 316; *D'Emden* v. *Pedder* (1904) 1 C. L. R. 91, 111, 113: "We think that, sitting here, we are entitled to assume—what, after all, is a fact of public notoriety—that some, if not all, of the framers of that Constitution were familiar, not only with the Constitution of the United States, but with that of the Canadian Dominion and those of the British colonies. When, therefore, under these circumstances, we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation. . . . We are fortified in our conclusion by the fact that the doctrines laid down in *McCulloch's Case* have been adopted and followed in the interpretation of the Constitution of the Dominion of Canada by the Courts of the Provinces of Ontario and New Brunswick since the year 1878, and that their decisions . . . have not been made the subject of appeal either to the Judicial Committee or to the Supreme Court of Canada." *Cf. Deakin* v. *Webb* (1904) 1 C. L. R. 585, 624; *Webb* v. *Outrim,* [1907] A. C. 81, 88-9, per Lord Halsbury; *Attorney-General for Australia* v. *Colonial Sugar Refining Co.* [1914] A. C. 237, 253-4, per Haldane, *L. C.*

[6] *E. g.* the judgment of the Court of Cessation (Supreme Court) of Rumania in the case of the Municipal Tramways Society of Bukarest, involving the question whether the courts could declare a statute unconstitutional. The judgment of the court below was based largely on an opinion of two professors of law in the University of Paris, concurred in by seven of their colleagues ([1912] 29 *Revue de Droit Public* 138-56). The Court of Cassation refers in so many words to the "doctrine" of the countries in which the right of passing on the constitutionality of statutes is not withheld by the law itself (*ibid.* 367). *Cf.* the decision of the superior court (*Obergericht*) of the Swiss canton of Solothurn, June 27, 1916 (1917) 13 *Schweizerische Juristen-Zeitung* 391-2, concerning the question in how far public things (*res publicae*) can be acquired by prescription, and defining, for the purpose of the judgment, the concept of a public thing: " . . . The theory which prevails in Germany assumes (*cf.* Fleiner in his *Institution des deutschen Verwaltungsrechtes* p. 310) that public things are subject to the order of private law, unless public law is to be applied to them. The teaching developed by Otto Maier in his *Verwaltungsrecht,* under the influence of French law, namely, that the property of things in common use is not property in the sense of civil law, but so-called public, publicistic, property, which is subject to the rules of public law—has found in Germany but few followers. The German-Swiss legal systems follow mostly the conception which is prevalent in Germany and which was built up on Roman ideas and on those of German law . . . In particular, the group of codes following the Austrian Code of Private Law, to which belongs the Civil Code of Solothurn, assumes that the state has in public things not only overlordship, but also property at private law" (references follow to a judicial decision and to text-books). See also the conclusions of the *commissaire du gouvernement* (as to his functions, Hauriou, *Précis de droit administratif* [7th ed. 1911] 972), in the case of *Lemonnier, Dalloz* 1918 III, 9, 10: "The Tribunal of Conflicts has played in this classical struggle a rôle altogether analogous to that of the Supreme Court of the United States" (by allowing only as much of the important decree of September 19, 1870, to remain in force as "was not contrary to a principle of public law considered as one of superior order, the principle of the separation of powers").

[7] *E. g.* Bracton, *De Legibus et Consuetudinibus Angliae* (ab. 1258) 5b, 8.

tion of the United States found it indispensable to utilize the experience of mankind in various states and at various times, it would appear even more important to adopt the same procedure on a scientific basis now that developments in every country reflect immediately upon conditions in other countries.[8]

Every new development in mathematics, physics, chemistry, physiology, anatomy, or pathology is immediately applied by distinguished engineers, or physicians, all over the world. Why should not the science of man in society, and of public law, which is the basis of social organization, be utilized by lawyers and legislators?[9] In recent years there appears to exist in many countries a tendency to assign to the public organization more and more new duties, and to infringe anon and again upon the domain hitherto left to individuals and to their voluntary associations.[10] This development requires a new framework, in order to check abuses, to further attempts at extending public action, if desirable, or to hamper them, if objectionable. A study of the various ways in which different countries are meeting these problems, and particularly of the ways of enforcing the responsibility of the state and its officials,[11] cannot fail to be useful. To quote Dean Stone:

---

[8] For instance, the recent so-called Guild Socialist movement in England, not without exponents in this country; the legal ideology of the movement is based largely on a study of the works of Prof. Duguit, whose theories are almost entirely the outcome of his (undoubtedly masterful) knowledge of French law. *Cf.* the spread of the institutions of social insurance in the last few decades, and the constant growth of the fields of State activity not only in Germany and Austria, but also in England and her dominions, and in the United States. It would be idle to maintain that the spread of the same tendency over so many countries is accidental. Man, as Aristotle observed, is a μιμητικώτατον ζῶον, a most imitative creature.

[9] "The signs are not wanting that the time has now arrived when an educational institution of dignity and importance may profitably direct its attention to the study of law for scientific purposes with reference to ultimate law improvement rather than exclusively for professional training." *Report of the Dean, School of Law, Annual Report, Columbia University* (1916) 59.

[10] It is not necessary to consider here whether this tendency is good or otherwise. A Swiss writer deplored it in 1912, in an article entitled "Less State!" (*Weniger Staat!*), as "the gravest danger to the peace of the world." Eggenschwyler in (1912) 9 *Schweizerische Juristen-Zeitung* 157, 159.

[11] As, under the influence of Continental Europe, the activities of the state are extended, it might be worth while to study the ways employed to decide such conflicts. There may be:

1. personal responsibility of officials for defaults through negligence or malice;
2. responsibility of the state for such defaults before ordinary courts;
3. responsibility of the state for such defaults before administrative courts;
4. a possibility of suing the state in cases arising from its private property, before ordinary courts, without its consent;
5. a possibility of complaining of illegal official acts (with a view to having them set aside) to the ordinary courts;
6. a possibility of complaining in such cases to the administrative courts.

Of these ways of safeguarding the rights of the individual, the first, second, fourth, and sixth, or one or more of them, are applicable in most cases in Italy; the first, third, fourth and sixth in France; the first and fifth only in England and the United States. In Continental monarchies the rulers have been subject to action in ordinary courts in matters relating to their private property. Moreover the supervision over the administrative bodies in respect to the legality of their acts has of late been more and more transferred, in England, from the courts to the

" . . . our entire legal system is in the process of undergoing reëxamination in the supposed interest of reform, not always scientific and frequently undertaken by those who have no very thorough or comprehensive knowledge of it. It is important in the public interest that the leadership in this investigaton should be entrusted to those whose conclusions will inspire confidence because of their disinterestedness and because they are the product of scientific scholarship rather than to the politician and the agitator. To be scientific such an investigation of our law must be based on an adequate understanding of economic conditions and must be carried on in comparison with other legal systems and this is the great task of legal scholarship in this and the coming generation, namely, the study of our law both historical and analytical, in comparison with other systems for scientific purposes. . . . "

" . . . The multiplication of precedents and the enormous increase in the mass of legislation, most of it ill-considered and unscientifically drafted, are introducing into our legal system an uncertainty and confusion to which the Anglo-Saxon peoples have hitherto not been accustomed. Nothing can be more important to the future well-being and good order of society than the preservation of the traditional certainty and generality of the English common law both in the field of the common law and of legislation, and no single influence can be more potent in attaining that end than scientific scholarship applied to legal problems and systematically directed toward law improvement. . . . "[12]

Every practical lawyer knows the need of considering legal rules in the light of the history of their introduction into the legal system. This is true of statutes [13] as well as of judge-made law.[14] Even when courts have decided a point, scientific reconsideration may show that the prem-

---

administrative boards (not to administrative courts), *cf. Board of Education* v. *Rice* [1911] A. C. 179, 182; *Local Government Board* v. *Arlidge* [1915] A. C. 120, 132; *cf.* (1918) 31 Harvard Law Rev. 644-6. Prof. Dicey rightly complains that while the French system is being "judicialized," the law of England is being "officialized," if the expression may be allowed, by statutes passed under the influence of socialistic ideas. *Law of the Constitution* (8th ed. 1915) XLVIII. In other words, the individual is deprived of his security instead of having it increased. This is clearly because the public law is not prepared to adapt itself, as to the safeguards of the individual rights, to changes which the influence of foreign countries has brought about in the extent of public activities.

[12] *Report of the Dean, School of Law,* Annual Report, Columbia University (1916) 59, 60; and (1919) 100.

[13] *Infra,* footnotes 35, 62.

[14] See for a statement of the necessity of "comparative, or eclectic jurisprudence" the address by the late Professor Hohfeld on *A Vital School of Jurisprudence and Law* (1914) Proceedings of the Fourteenth Annual Meeting of the Association of American Law Schools 86-96. *Cf.* Pollock, *Oxford Lectures* (1890) 9, 10, 35: "A bare account of existing laws may be sufficient for common practice; but at many points it must leave unsatisfied curiosity in a mind that is curious at all. Doubts and anomalies force us to inquire how the particular legal system and its various parts came to be what they are. And if we pursue the inquiry far, we shall find that, as many things in existing law were explicable only through history, so the history of one system is not complete in itself. Sooner or later we break off in a region of tradition and conjecture where we can guide ourselves only by taking into account the kindred institutions of other nations and races . . . English learners run an appreciable risk . . . of regarding legal science as a thing apart from legal practice . . . Little has yet been done to make it clear that the object of these studies is not to enable English lawyers to talk with an air of knowledge of foreign systems or abstract speculations, but to make them better English lawyers by the exercise of comparison and criticism."

ises were false or the reasoning mistaken.[15] The principles enunciated may then be revised,[16] if necessary by legislation.[17] Every lawyer, truly de-

[15] In the case of *Tobin* v. *Queen* (1864) 16 C. B. N. S. 310, it was decided that no petition of right (corresponding with an action in the United States Court of Claims) would lie for a tort. This decision was supposedly based on a consensus of opinion from Bracton to Blackstone, on Lord Somers' judgment in the *Bankers' Case* (1700) 14 St. Tr. 1, and on lack of precedent to the contrary. Now, Lord Somers' judgment contains, as regards this question, only what one is tempted to call "dicta by implication." Blackstone's and Coke's statements, as quoted, were historically wrong, and Bracton's statement was misunderstood. L. Ehrlich, *Proceedings against the Crown* (1921) 21-23, 42-49, etc. On the other hand, in Italy it was claimed as early as the 'seventies of the last century that "the state could not always and in all cases be freed of all responsibility (for acts of its functionaries) toward its citizens, . . . The opposite system, one of our distinguished writers has said, would touch the extreme limits of despotism, which is repudiated by all the civilized governments and in Italy, since her glorious revolution, no one thinks any more of putting it into practice." (1876) 1 *Foro Italiano* I. 274 n. *Cf. supra,* footnote 11. As Mr. Justice Miller put it, *United States* v. *Lee* (1882) 106 U. S. 196, 207, 1 Sup. Ct. 240, "while the exemption of the United States and of the several States from becoming subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine." *Cf. supra,* footnote 4. The same rule applies in England to actions against the King. Yet, even in England, there is a tendency to loosen the severity of the rule, *cf. Dyson* v. *Attorney-General* [1911] 1 K. B. 410, 415, 417 (per Cozens Hardy, *M. R.*): "It has been settled for centuries that in the Court of Chancery the Attorney-General might in some cases be sued as a defendant as representing the Crown, and that in such a suit relief could be given against the Crown. . . . The absence of any precedent does not trouble me." In some of the British dominions the rule has been considerably modified, and in New South Wales the petition to the governor to appoint a nominal defendant (within a month, otherwise the Colonial Treasurer shall be nominal defendant) is the only reminiscence of the requirement of a petition to the Crown. (Claims against the Government and Crown Suits Act, N.S.W. Act No. 27, 1912, esp. § 9.) In 1884, the (Supreme) Court of the (German) Empire (*Reichsgericht*) in the case of the *Generalsteueramt* of the Free City of Bremen against the *Gewerbebank* of Bremen had to consider whether an action before ordinary courts was permissible for the purpose of recovering taxes unduly levied. It was not questioned that in order to redress the violation of private rights action against the state before the ordinary courts was admissible (without any petition), but the court considered it necessary to inquire *ex officio* whether such an action could be brought to recover taxes. The decision was affirmative, and was based on a historical disquisition with the following conclusions: "The ordinary courts are called upon to decide conflicts of property rights even if forms of public law must be applied in order to decide them. . . . With this historical premise and prevailing general opinion it would not be justifiable to conclude that because there is perhaps in the statutes of the Empire no positive provision about the admissibility of actions before the ordinary courts against the fiscus of the Empire," (if its direct organs have levied something like stamp duties) "or against the fiscus of one of the States" (if its officials have done so for the account of the Empire), "therefore the statutes of the Empire exclude such actions, and therefore the legal order of the German Empire has suffered a retrograde development (*zurückgeschritten sei*) even in comparison to the laws of the individual states. A positive statutory rule of the Empire would be necessary to exclude in such a case . . . actions before ordinary courts . . ." 1884) 11 *Entscheidungen des Reichsgerichts in Civilsachen* 65 *et seq.* As to France and Italy, see *supra,* footnote 4 and *infra,* footnote 18.

[16] *Cf.* as early as 1458, the statement of Fortescue, *C. J.,* (1458) Y. B. 36 Hen. VI 25-6: "Sir, the law is as I have said, and has been so ever since the law began, and we have many courses and forms which are held for law, and have been so held and used because of reason, although that reason is not ready in memory. But by study and work, one can find it. And if any such form or course be used and shall have been used contrary to reason, it is not bad to correct it."

[17] Difficulties encountered in one legal system may often be overcome by

voted to his profession, takes pleasure in comparing the ways in which the same legal problem is dealt with in different legal systems.[18] For instance, much light could be thrown on the now raging controversy over "declaratory judgments,"[19] if the legislators and judges had at their disposal better means of studying such institutions in England and Continental Europe.

---

adopting a device used in another. Thus, the opinion of the minority Justices in *United States* v. *Lee, supra,* footnote 15, per Mr. Justice Gray pointed out that ". . . it is essential to the common defense and general welfare that the sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war . . . of custom houses and revenue cutters . . . or of light houses and light-ships." This is true. In order to obviate the difficulty, other legal systems have adopted the distinction between public and patrimonial property of the state, *e. g.* Spanish Civil Code art. 338-40; *cf. e. g.* Italian Civil Code art. 426-30; Austrian Civil Code §§ 286-90; and see French Civil Code §§ 538-41; otherwise, Civil Code of Brazil art. 66-7.

[18] *E. g.* in *The Siren* (U. S. 1868) 7 Wall. 152, it was laid down, in effect, that a claim against the government of the United States, arising out of collision with a government vessel, is an *obligatio naturalis,* because the "inability to enforce the claim . . . is not inconsistent with its existence." ". . . although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institutes a suit they waive their exemption so far as to allow a presentation by the defendant of the set-offs, legal and equitable, to the extent of the demand made or property claimed." *Cf. United States* v. *Macdaniel* (U. S. 1833) 7 Pet. 1, and *United States* v. *Tench Ringgold* (U. S. 1834) 8 Pet. 150. On the other hand, the French legal system allows certain actions to be brought against the state before the ordinary courts, and all the others before the Council of State (in its *de facto* judicial capacity). There is, therefore, no *obligatio naturalis,* but a claim enforceable in one court or the other. Yet, if the state brings an action in the ordinary courts, the defendant can offset his claim to the extent of the principal demand, as *exceptio,* though not as a separate claim. In *État* v. *Compagnie générale française des tramways,* Court of Appeal of Nancy, *Dalloz* 1919 II, 58, it is said: ". . . The principle of separation of powers . . . is of a public character (*d'ordre public*) and can not be defeated by counterclaim any more than by direct claim; . . . undoubtedly, the court below could and must, in order to decide on the principal demand, appreciate the whole of the case, and, should need arise, it must draw the consequences from the fault of the military chauffeur, in order to reject the demand of the State as plaintiff; but . . . there the jurisdiction of the court stopped . . ." An analogous German case, *Norddeutsche Versicherungs-Gesellschaft* v. *Reichsfiskus,* was decided by the (Supreme) Court of the Empire in 1897 . A steamer passing the Kiel Canal had taken on a pilot who disobeyed a police rule and brought about a collision which resulted in damage to the steamer. The damage was compensated by two insurance companies which thereupon sued the Empire. The Empire was ordered to pay, the court of appeal adding that the liability was limited to the pilot boat. The Court of the Empire declared that the Empire like any other corporation is liable for damage caused by its employees so far as they exercise functions which they are called upon to exercise, even if they violate police regulations which they are supposed to observe. (1897) 39 *Entscheidungen des Reichgerichts in Civilsachen* 183. A distinguished American teacher of law was asked, some short time ago, what steps could be taken by a man who had suffered damage through the negligence of a U. S. mail-van driver. The answer was: "Forget all about it." In an analogous case before the Italian courts a short time ago, the Court of Cassation of Rome confirmed the judgment of the lower court which held the Ministry of Posts liable for damages, observing that it made no difference for the purposes of civil responsibility whether the messenger, while using the bicycle, had acted with or without public authorization, it being sufficient that the action which violated the right was done in the exercise of that sphere of the activity of the public body (*ente pubblico*) which formed the object of the relationship of employment (*la quale formava oggetto del rapporto institorio*). (1916) 41 *Foro Italiano* 58.

[19] (1921) 34 Harvard Law Rev. 697 ff.; (1918) 28 Yale Law Journal 1.

There are few serious statesmen or scholars who do not speak of the necessity of some kind of international understanding. To be sure, a certain coöperation has been in existence for centuries. On account of the modern progress of democracy, it seems important to make "the many" understand what so far it has been enough for a very few to know, namely, the similarities and differences between the organization of different societies. But so far there have been only superficial disconnected attempts at comparing the paper constitutions or other enactments of various countries. It is, of course, only a stepping stone towards a scientific study of public law if one describes an institution as it exists in one country, and as it is supposed to exist in a few other countries, according to statutes or to second-hand text-books. Similarly, a course on comparative government by someone who has just read a few text-books, is worth little more than a course on motors given by a man who had read assiduously a popular periodical dealing with mechanics. One must have studied the organization of states and empires in a scientific way before one can realize the differences of social and political conceptions. Compare the Prussian constitution of 1850, first with its model, that of Belgium, and then with the actual results of Prussian administration;[20] trace in theory and in practice the rule as to royal legislation in emergencies through the Danish, Austrian and Russian legal systems; study the manorial system in Prussia, Austria and Russia,[21] and compare it with the theoretical pronouncements of the constitutions of those countries; compare any Mexican constitution as applied in that country with the Constitution of the United States as applied in America. Then it will be clear how much work has to be done before those trying to bring about international understanding can see their way through the maze of differences and ignorance.

I. Comparative Public Law

(1) *Law.*

In order to determine what rules of human behavior we shall consider as law, it might seem natural to begin with a definition of what is meant by law. Theoretical definitions[22] will not help us in this respect. Neither the purpose of law as delimitation of various interests,[23] nor a

[20] Anschütz, *Die Verfassungs-Urkunde für den Preussischen Staat,* I (1911). See, *e. g.* art. 4, which declares that all citizens are equal before the law, and which was held not to stand in the way of a statute which allowed the expropriation of citizens of Polish tongue, for the benefit of *Deutschtum.*

[21] Few Americans realize that the manorial system existed until the end of the Great War, and that some of its traces still affect the post-war settlement. It is not necessary to mention the two Grand Duchies of Mecklenburg, with their essentially feudal organization. Zeydel, *Constitutions of the German Empire and German States* (1919) 186-8. In most of the provinces of Prussia the system has been a bulwark of Junkerdom: legal immunities, privileges and rights, as well as economic power, have continued to place the countryside at the disposal of the mighty landlords. The same system prevailed until recently in Russia and in parts of Austria.

[22] Holland, *Jurisprudence* (12th ed. 1916) 14-24.

[23] See Vinogradoff, *Common-Sense in Law* (1914) 43; or, as "the totality of the

description of the law as *ars boni et aequi,* [24] nor again, the definition of law as a set of rules imposed and enforced by a society with regard to the attribution and exercise of power over persons and things, [25] will be definite enough to aid in distinguishing legal from non-legal rules. We must adopt some criterion which will, generally speaking, be true in most countries and in most cases. This will still leave a few exceptions on the borderline. Perhaps, for practical purposes, a broad distinction between legal and non-legal rules might, however loosely, be based on the fact that in all countries certain rules are, while others are not, enforced, or recognized, as law, by courts of law.[26]

The rules thus recognized as forming the law are human ideas. Like other social sciences, the science of law is not only ideological, but also psychological, and to limit it to ideology is to mistake the egg-shell for the egg. The ideology of law deals with legal ideas and with the formal history of their development. The psychology of law gives the explanation for the appearance, development, taking over, and adaptations of the various rules. To speak of "pure jurisprudence" as jurisprudence "purged of psychological elements" [27] is like speaking of pure mathematics as purged of arithmetical elements.

In speaking of law, for the purpose of the study of comparative public law, it may be useful to limit oneself, at least at first, to positive law, *i. e.,* the law as it is or has been, and not as it might, should, or will be. The scope of the investigation should not be expanded by introducing philosophical speculations about the essence or purpose of law in general. Care should be taken not to confuse what is the law with what should be the law, which might easily happen if one drew too far-reaching logical conclusions. It is not what law is according to the logical reasoning of the writer, [28] but what it is in practice that should serve as a basis of comparison.

---

compulsory rules which prevail in a state," Ihering, *Der Zweck im Recht* (2d ed. 1884) 320. In most cases it is hardly possible to compel one to abstain, for instance, from murder. There are, on the other hand, many ways in which other men "compel" us to do or not to do certain things, more successfully than if they used the means of compulsion which we attribute to law. Croce, *Filosofia della Prattica,* (trsl. Ainslie 1913) Part III.

[24] D. 1, 1, 1.

[25] Vinogradoff, *op. cit.,* 59.

[26] See Dicey, *op. cit.,* 23; *cf.* Gray, *Nature and Sources of Law* (1909) 101; Stone *Law and its Administration* (1915) 19. It is a suggestive fact that even a German theorist like Jellinek had to admit this criterion as the ultimate one, *Allgemeine Stattslehre* (2d ed. 1905) 351, although it hardly squares with his own theories. See, also, (1903) 54 *Entscheidungen des Reichsgerichts in Civilsachen* 19, *infra,* footnote 35.

[27] Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920) III. The same writer has characterized psychological or sociological jurisprudence as a methodological monster. *Hauptprobleme der Staatsrechtslehre* (1911) 709.

[28] Preuss, a German scholar who did more work than any other on the new German constitution, (Giese, *Die Verfassung des Deutschen Reiches* [2d ed. 1920] 37 ff.), said in 1908, in a review of a book by Krabbe, *infra,* footnote 96: "Krabbe's criticism of the dogma of individual sovereignty of princes . . .

(2) *Public Law.*

We do not need to spend much time over the delimitation of public from private law,[29] if we once admit that a broad distinction rather than a hard-and-fast criterion is required. The differentiation is very familiar in the Anglo-American legal system,[30] (although this system has, in theory at least, the unitary hierarchy of courts),[31] but has, of late, been exposed to attacks.[32] It will be best for our purposes to follow Professor Vinogradoff, who lays stress on the fact that the classical division of law into public and private law originally was introduced into jurisprudence for the purpose of study.[33] There is no one criterion which[34]

---

needs no further exposition, because those atavisms are still, indeed, very powerful in practice, but not in the *Wissenschaft.*" (1908) 23 *Archiv für öffentliches Recht* 308-9. One would have thought that practice was more important than that. Theorists may well point out mistakes and show new ways. This must be done most cautiously lest the wish be mistaken for its child. "Unguarded analytical speculation tends to make jurisprudence a thing of abstract formulas—as it were a sham exact science—instead of a study of human life and action." Pollock, *Oxford Lectures* (1890) 34.

[29] *E. g.* Holland, *op. cit.*, 128, 366-90; Pollock, *First Book of Jurisprudence* (2d ed. 1904) 92-8.

[30] Thus, following Azo, Bracton, *op. cit.*, f. 3b, with a misunderstanding pointed out by Maitland, *Bracton and Azo* (Selden Society 1895) 33; as to Bacon, *cf.* Holland, *op. cit.*, 366; *Brown* v. *Turner* (1874) 70 N. C. 93, per Bynum, *J.*: "It comes within the definition of public law." *Cf. Butler* v. *Pennsylvania* (U. S. 1850) 10 How. 402; *Attorney General* v. *Jochim* (1894) 99 Mich. 358, 58 N. W. 611.

[31] But see *supra,* footnote 11; Dicey, *op. cit.*, Introduction xxxviii-xlviii; Goodnow, *Comparative Administrative Law* (1893) 88, 198-9; (1918) 31 Harvard Law Rev. 644-6. The medieval exchequer acted as an administrative tribunal in the modern sense of the word. L. Ehrlich, *op. cit.* 29.

[32] Kelsen, *Hauptprobleme der Staatsrechtslehre* (1911) 269-70, 630; Laun in (1912) 39 *Zeitschrift für das Privat-und öffentliche Recht der Gegenwart* 310; Weyr, *Zum Problem eines einheitlichen Rechtssystems* (1908) 23 *Archiv für öffentliches Recht* 529-80; *Weyr, Über zwei Hauptpunkte der Kelsenschen Staatsrechtslehre* (1914) 40 *Zeitschrift für das Privat-und öffentliche Recht der Gegenwart* 183-8: "A difference between the so-called public and private law is juristically intangible (*nicht erfassbar*); it can be explained only historically and psychologically, but it is today no longer legitimate."

[33] *Huius* studii *duae sunt positiones, publicum et privatum.*" D 1, 1, 1, 2.

[34] Whereas the conception of public, as distinguished from private law "has been accepted, and is in daily use, in the legal speculation and practice of the continent of Europe, but unfortunately finds no equivalent in our insular" (the English) "legal terminology," Holland, *op. cit.*, 366-7, yet in England and in the United States public law is frequently mentioned as present in private law "only as arbiter of the rights and duties which exist between one of its subjects and another." *Ibid.* In Continental Europe, the state, in its capacity of a corporation owning property, is under the rules of private law; it can, as a rule, be sued before the ordinary courts. It is only with regard to official acts as such that jurisdiction is sometimes reserved to courts of public law, or, at any rate, withdrawn from the competence of the ordinary courts. See *Dekeister* contra *Postes, Dalloz* 1862 III, 4, 5; *Blanco, Dalloz* 1873 III, 20-21; *cf. supra,* footnotes 15, 18; German Civil Code, § 89. See also the judgment of the Court of Appeal of Trani in *Bassi* v. *Finanze* (1876) 1 *Foro Italiano* 498, 499, distinguishing the state as government, as sovereign power and moderator within the bounds of society, and the state as a moral and juristic person attending to its civil interests through the organs of administration. In this latter respect, "the organs of administration are under the rule of the principles of the common law, they exercise rights, assume obligations, bring actions and raise exceptions in the courts through representatives and agents, and therefore bear the responsibility for the consequences of the respective facts and acts . . . "

could be universally applied.[35] Consideration of public utility enters into private (*e. g.* family law) as well as the public law—and the confusion is accentuated by the well known fact that in Roman law *ius publicum* might mean simply *ius cogens* as distinguished from *ius dispositivum.*[36] For our purposes it will be enough to include the groups of law usually classed under public law (constitutional, administrative, ecclesiastical), with criminal law and the law of procedure only as occasion arises,—and with the understanding that whatever is considered in any country as public law must be compared with similar institutions in other countries.

---

[35] It would seem tempting to assume that in countries with administrative courts, as distinguished from ordinary courts, the causes judged by the latter belong to private, other causes to public law. Such an assumption will not stand investigation. For instance, in Austria, actions against judges for damage done in the exercise of office through negligence or malice, and similar actions against the state as responsible jointly with the judges, were brought before special sections of ordinary courts, while actions against the state for wrongful conviction (independently of any guilt on the part of judges) were decided by a special court of public law, the so-called *Reichsgericht.* Furthermore, in Austria actions of state employes against the state based on the official relationship (*e. g.,* claims as to pensioning, salaries, etc.) have been judged by the *Reichsgericht,* whereas in the German Empire they have been judged by the ordinary courts. *Oberpostdirection Schwerin* v. *Reichardt's Erben* (1876) 21 *Entscheidungen des Reichsoberhandelsgerichts* 48; (1889) 22 *Entscheidungen des Reichsgerichts in Civilsachen* 288; (1904) 57 *ibid.* 350. On the other hand, the Swiss *Bundesgericht* seems to adhere to the opinion that private law disputes belong before the ordinary courts, public law disputes must be settled by the administration. Thus, the *Bundesgericht* decided in *Schellenberg* gegen *Bund* (1899) 25 *Entscheidungen des Schweizerischen Bundesgerichts,* I 430, that the relationship between an officer and the Federation "is based on a peculiar ground which makes it, from the first, one of public law. Hence the duty of the Federation to pay compensation for the use and deterioration of the horse must be defined as one of public law . . . Therefore such claims cannot be raised by way of a civil action . . . " This theory, however, is by no means accepted by the courts of the various Swiss cantons. For instance, in Zurich the courts have repeatedly emphasized the fact that the necessity of applying rules of public law, or the derivation of a claim from public law, does not deprive the ordinary courts of their jurisdiction in such cases. See Hungerbühler in (1919) 16 *Schweizerische Juristen-Zeitung* 113, 118-20, and the decisions quoted there. As to the difference between the French and Italian conditions, see *supra,* footnote 18. It may be added that while in France the responsibility of the state for torts committed by its agents leads to actions before administrative courts, in the Prussian Rhine Province, that is, in the territory which has, more than any other part of the German Empire, retained in its legal organization traces of its former connection with France, "the question of the responsib lity of the state for actions of its officials has always been considered a question of civil law." (1903) 54 *Entscheidungen des Reichsgerichts in Civilsachen* 19, and the decisions and "extrinsic aids" quoted there. On the other hand, in the recent French case of *Lemonnier,* the *commissaire du gouvernement, supra,* footnote 6, reminded the Council of State that the responsibility of the state and of the other public corporations is not in any way regulated by art. 1384 of the Civil Code, and that the agent will be responsible before the ordinary courts, only if his fault is entirely detached from the service, while the public body will always be responsible before the administrative courts unless the service had nothing whatever to do with the fault of the agent. *Dalloz* 1918 III, 9, 11.

[36] D 2, 14, 38 (Papinian), *"Ius publicum privatorum pactis mutari non potest."* It is true that this may have related to public law in the modern sense, *cf. ibid.* 42, "(*idem.*) *pactis etenim privatorum formam iuris fiscalis convelli non placuit;"* yet Ulpian says, D 50, 17, 45, *"Neque pignus neque depositum neque precarium neque emptio neque locatio rei suae consistere potest. Privatorum conventio iuri publico non derogat." Cf.* Longo's remark in the Italian edition of Girard under the title *Manuele Elementare di Diritto Romano* (1909) 14 n. 2. Fiore, *Diritto Civile Italiano* I (2d ed. 1908) 17, remarks that a civil code must contain pro-

(3) *Comparative Public Law.*

Less difficulty will be experienced in determining what should be meant by "comparative" public law. Let us begin, by all means, with the modern countries which have been the constructors and custodians of Western civilization;[37] but modern ideas often have ancient origins and the tradition which has made them survive must be traced as far into human history as possible. In other words, we must study the history of ideas;[38] modern public law must be expounded in the light of its history. Secondly, modern social conditions are the result, not only of certain ideas, but also of certain psychological factors belonging to present and former organizations.[39] Not only the study of public law of modern civilized nations, but also anthropology and even animal psychology[40] may help formulate important conclusions in the study of modern public law.

The conceptions of acts of state,[41] of political representation,[42] of consent,[43] of social contract,[44] of grants,[45] of separation of powers,[46]

---

visions of a "public order," and in his discussion the difficulty of distinguishing between public law and *ius cogens* is particularly obvious.

[37] *E. g.* Jellinek, *Allgemeine Staatslehre* I (2d ed. 1905) 22.

[38] McIlwain, *High Court of Parliament* (1902) 2, quoting Maitland, *Domesday Book and Beyond* (1897); and see Gierke, *Johannes Althusius* (1800) VII.

[39] The French system of administrative courts, and, in particular, the judicial functions of the *Conseil d'État,* grew out of the fact that the *Conseil* was the ruler's legal adviser and that complaints against illegal administrative acts could be brought only to the administration itself; in the last instance, to the ruler. This latter principle was based on a law of 1790 which, purporting to be based on the theory of separation of powers, was, in fact, a result of the impatience of the French reformers during the Revolution with the action of the courts called *Parlements,* declaring many new measures illegal. This reaction against the courts was, in its turn, a repetition of the royal displeasure with the *Parlements* (abolished 1771, re-established 1774) because the *Parlements* had been refusing to "register" such royal decrees as they considered illegal. Thus, the *Parlements,* at one time an obstacle to autocracy, incurred the wrath of the elected legislature and there appeared demands for the emancipation of the administration. See *e. g.,* Laferrière, *Traité de la Juridiction Administrative* I (2d ed. 1896) 180-3, esp. 181; Hauriou, *supra,* footnote 6, p. 29-30; *Brissaud, Cours d'histoire générale du droit français* I (1904) 885-7. History repeats itself. *Cf. supra,* footnote 34 and *infra,* p. 642. . . .

[40] There is, for instance, in the animal world a good deal to make us realize the psychological background of the principle of "acquired rights." See also, *e. g.,* Ihering, *Zweck im Recht* I (1884) ch. I, VIII.

[41] See on "political questions" as distinguished from "judicial questions" *McConaughy* v. *Secretary of State* (1909) 106 Minn. 392, 119 N. W. 408; on "acts of State," *Musgrave* v. *Pulido* (1879) 5 App. Cas. 102, 111; on "political acts," art. 22 of the Italian Statute of August 17, 1907 on the Council of State; and *cf., e. g., Ministero dell'interno* v. *Queto* (1914) 39 *Foro Italiano* I, 472.

[42] For instance, it is customary to insert in European written constitutions a provision that the representative represents the whole nation and not an individual district; the American rule requires a certain connection between the representative and the state which elects him. Hence in America the election depends more on local elements, and the institution is thus kept in accord with the original conception of political representation; it is also impossible for a national party organization to force its favorite upon an unwilling constituency. On the other hand, the European rule makes possible the election of most important leaders of public thought whose misfortune it may have been to incur the ire of the district in which they happen to be resident. See Stubbs, *Constitutional History of England* II (4th ed.) 251, 253; Esmein, *Cours élémentaire d'histoire du droit français* (11th ed.) 19, 559-61.

[43] In the history of political institutions the recognition that a man is bound

of acquired rights,[47] of the protection of rights of individuals[48] — these are just a few examples of topics requiring the study of the old and new law of different countries.

---

by his own promise came very late; younger still is the possibility of considering a man bound without his promise. See *e. g.,* (1442) Y. B. 20 Hen. VI 12-13, on the question whether the mere presence of a clergyman in a convocation which by a vote of the majority granted a sum of money to the king was the foundation of the clergyman's obligation to contribute toward the sum in spite of a royal privilege exempting him. *Cf.* also the case of *St. Albans* (1358), L. Ehrlich, *op. cit.* 113, 146-7, 243-6.

[44] The theories of "social contract" are closely connected with the doctrine of consent. They were, in fact, the foundation of feudalism, which was based on a vast mass of express and implied agreements. The writers of the seventeenth and eighteenth centuries developed various aspects of a theory which had prevailed in practice for a long time, *cf.* Carlyle, *History of Mediaeval Political Theory in the West* III (1915) 12, 13, 74, 147-69, 185. In particular, Locke and Rousseau used the conception of original compact as fictions which would justify the existence and extent of political power. The conception of social contract lies, of course, at the bottom of American political organization. See *e. g.* apart from the various constitutions and other constitutional documents, *In re Opinion of the Justices* (Me. 1919) 107 Atl. 673, 674: "It is a familiar, but none the less fundamental, principle of constitutional law that the Constitution of the United States is a compact made by the people of the United States to govern themselves as to general objects in a certain manner, and this organic law was ordained and established, not by the states in their sovereign capacity, but by the people of the United States . . . ." *Cf.* the Preamble of the German Constitution of 1919 and that of the Polish Constitution of 1921.

[45] *Dartmouth College* v. *Woodward* (U. S. 1819) 4 Wheat. 518 seems to be an adaptation of new methods to old ideas which were thought worth adhering to. The whole medieval legal system was built upon a recognition of the rights and duties of indivdualism; the sanctity of grants was one of the dogmas. L. Ehrlich, *op. cit.* 9 ff. 53, 115f. This conception began to lose its prevalence as early as the fourteenth century, *ibid.* 112, but it survived until the nineteenth century. It held its own in the eighteenth century in the British Empire, *Campbell* v. *Hall* (1774) 20 St. Tr. 239; it lies at the bottom of the present constitutional arrangement in Italy, for the *Statuto* of 1848 is a grant from the king, although some of the provinces which later submitted to it, did so by plebiscite. There is of course not the slightest idea or possibility of withdrawing it. On the other hand, Austrian history since 1848 and Russian history since 1905 know many cases of withdrawals of privileges solemnly granted. It all turns on the question whether he who gives may take away.

[46] There is a striking difference between the American system of checks and balances and the French system which forbids the judges to meddle with acts of the administration or of the legislature. French Criminal Code §§ 127 *et seq.; cf.* §§ 130-1, and *supra,* footnotes 18, 39. See also the judgment of the Supreme Court of Chile, *Cortés* v. *Vasquez Rey* (1916) 14 *Revista de Derecho* 340, 346(8); the practice in Argentine is in accordance with that in the United States. González, *op. cit.* 317-22. Of late French jurists have expressed the conviction that a statute which is contrary to a "constitution law" (*i. e.* to one of the fundamental statutes) may not be applied by the courts. *Supra,* footnote 6; Duguit, *Manuel de Droit Constitutionnèl* (3d ed. 1918) 305-6; Radin, (1920) California Law Rev. 91-3. The *commissaire du gouvernement* in the case of *Lemonnier, supra,* footnote 35, spoke of the Tribunal of Conflicts as exercising a jurisdiction analogous to that of the Supreme Court (why the limitation?) of the United States, in limiting the application of a statutory decree which violated, in its opinion, the principle of separation of powers. In other words, the principle of separation of powers in the American sense has been applied to enforce the principle of separation of powers in the French sense. Both interpretations go back to the famous doctrine found in Book XI, ch. IV to VI of Montesquieu's *Esprit des Lois.* The American application, *e. g.* Wilson, *Congressional Government* (1885) 12-13, is, of course, far more in harmony with the original theory.

[47] The theory of acquired rights is the corollary of the theories of consent and of grants; unlike, however, the now accepted idea of rights as relations between one man and other men, *e. g.* Hohfeld, *Fundamental Legal Concep-*

II. Fundamentals of the Study of Comparative Public Law

(4) *The Sources.*

Where are we to find our public law?

The theory of the sources of law has never been worked out satisfactorily.[49] As jurisprudence stands at present, we may well begin with the enumeration of a few types of so-called formal sources of law, which it will be necessary to use for all countries; but we must add that a more definite elaboration of the science of the sources of public law [50] ought to be one of the first tasks in working out its comparative study. Neither need we go too far in speculating on what should be the sources of law; for in the decisions of the courts of different countries, and in the pronouncements of the most important legal writers, there will be found enough variety of opinion to permit constructive comparisons and healthy suggestions.

The written law, and above all, written constitutions,[51] constitutional

---

tions (ed. Cook 1919) 72 ff., a right was considered in the Middle Ages primarily a relationship between a person and the object to which he had a right. Hence, we have the idea that a right is something not to be taken away without one's consent. *Cf.* in England, in 1914-15, the struggle to obtain the restitution to British subjects of their right to be tried by a jury. *Parliamentary Debates,* Lords, February 4, 1915, 443 f., and March 11, 1915, 687. *Cf. Vinogradoff, Magna Carta,* c. 39, in *Magna Carta Commemoration Essays* (1917) 78.

[48] *Supra,* footnote 11.

[49] See *e. g.* Gény, *Méthode d'interprétation et sources en droit privé postif* (2d ed. 1919); Vinogradoff, *Common Sense in Law* (1914) ch. V-VII; Pollock, *First Book of Jurisprudence* 1896 par. II; Amabile, *Le Fonti del diritto costituzionale,* and esp. Orlando, *Le Fonti del Diritto Amministrativo,* in his *Primo Trattato completo di Diritto Amministrativo Italiano* I (1900). Most of the work on these lines has been done within the domain of private law, and usually for one country only.

[50] Orlando, *Fonti del Diritto Amministrativo,* in his *Primo Trattato Completo di Diritto Amministrativo Italiano* I (1900); for other references, see *e. g.* Orlando, *Principii di Diritto Costituzionale* (5th ed. 1920) 55 n. 1. Some legal systems which adopt a distinction between private and public law, have a civil code with rules as to interpretation, as to judicial decisions, etc. Thus the French Civil Code (1804); the Austrian Civil Code (1811); the Civil Code of Chile (1844); the Italian Civil Code (1865); the Spanish Civil Code (1888), etc. In how far these rules are applicable to public law is far from determined. Orlando, *Le Fonti del Diritto Amministrativo,* in his *Primo Trattato Completo di Diritto Amministrativo Italiano* I (1900) 1057, considers that arts. 3 and 5 of the Italian Civil Code have a bearing which "is general, and therefore applicable also to statutes of public law." *Cf. ibid.* 1077. It has similarly been claimed recently by a high official of the judiciary in Chile (the Fiscal of the Tribunal of Accounts) that the rules which form the preliminary chapter of the Chilean Civil Code "are not exclusively proper to the civil law . . . but also to that which in other nations is called general law or national law." (1916) 13 *Revista de Derecho* 3, 4. On the other hand, some of these codes, the Austrian, Italian, and Chilean, contain the provision that judicial decisions apply only between the parties for, and in, the cases in which they have actually been pronounced—and yet this does not prevent both ordinary and administrative courts from applying in practice more or less consistently something approaching the rule *stare decisis.* See *infra,* footnotes 75-7.

[51] Especially the constitutions of the United States, of the individual states, of the Spanish American countries, of the several British dominions, and of Continental European countries. France has, not one constitutional charter, but three "constitutional laws" (amended from time to time); in addition, the rules formulated in the Declaration of Rights of Man and the Citizen of 1789 are considered the fundamental law. Duguit, *op. cit.* 220; and *supra,* footnote 18.

charters,[52] so-called organic laws[53] and similar collections of rules[54] must obviously be made the subject of a thorough investigation. This means, not only the rules themselves, as formally laid down, but their history, development, and the various ways of interpreting[55] and applying them. A vast amount of information in this direction, and much material of great jurisprudential interest is contained, in particular, in the decisions of the American courts, both state and federal. Attention must be paid to the decisions of the French, Italian, Swiss,[56] and German[57] courts,[58] as well as the Canadian, Australian, and South African courts, and of course, to the Judicial Committee of the Privy Council. How are those documents to be interpreted? Shall we interpret a statute in the light of its history, or as it would be formulated if its authors were to write it at the present moment?[59] May the judge use so-called extrin-

[52] Such as the Italian *Statuto*.

[53] *E. g.* the French organic laws on the election of deputies and senators.

[54] *E. g.* various British acts, such as the Bill of Rights; also the standing orders of legislative bodies; above all, many statutes and ordinances bearing on constitutional and administrative problems.

[55] For instance, the Great Charter has today sentimental rather than legal value, and yet it is important to lawyers. In American practice constitutions are given an interpretation differing from that applied to statutes, *e. g. Varney* v. *Justice* (1888) 86 Ky. 596, 600; *Lafayette, Muncie, and Bloomington Railroad Co.* v. *Geiger* (1870) 34 Ind. 185, 202, with the statement of several rules of constitutional construction enunciated by the Supreme Court of the United States; *cf.* Guthrie, *Fourteenth Amendment* (1898) 33. It would appear important to investigate in how far this rule, which is obviously inapplicable in England and Italy, is or can be applied in other countries and in how far its application in America is consistent. See *e. g. Perry County Telephone and Telegraph Co.* v. *Public Service Commission* (1919) 265 Pa. St. 274, 108 Atl. 659, 660.

[56] Some of the Swiss cantons have administrative as well as ordinary courts. *Cf.* on the whole subject, Jenny, *Die Verwaltungsrechtspflege in der schweizerischen Eidgenossenschaft* (1910). Of course, the decisions of ordinary courts are most important for students of public as well as of private law. *Cf. infra,* footnotes 75-7.

[57] One difficulty about German judicial decisions is that they are frequently printed with only the initials of the parties, thus making it more difficult to quote a leading case, because the reference has to be to volume and page of the printed edition.

[58] The Administrative Court and the Court of the Empire of Austria, *supra,* footnote 35, deserve some notice even although the Empire has ceased to exist.

[59] *E. g. Toncray* v. *Budge* (1908) 14 Idaho 621, 647, 95 Pac. 26, per Ailshie, *C. J.*: We must now determine the meaning of the language used in this section in the light of conditions as they existed at the time the constitutional convention was in session in July, 1889 . . . It would be useless to go to dictionaries and lexicons for definitions of such words and terms . . . as here used in the organic law of the state. We are now removed nearly nineteen years from the time about which we must inquire as to the social, civil, and political conditions that confronted the constitutional convention and the people of this territory, and for that information we must turn to the public history of the day as it can be gathered from the press, public writings and current literature of that time, aided by whatever memory we may have left as to the occurrence of those days." *Cf.* Guthrie, *op. cit.* 33: "A national constitution is intended to endure for all time. Its provisions should not in any sense be limited to the conditions happening to exist when it is adopted, although those conditions and the history of the times may well throw light upon the provisions and reveal their sense." Stone, *op. cit.* 44. The *Codigo Civil* of Chile provides in its art. 19, *supra,* footnote 50, that whenever the sense of the law is clear, the letter of the law must be applied, without disregarding it under the pretext of consulting its spirit. In order, however, to interpret an obscure expression, it is permitted to have recourse to the intent or spirit, clearly manifested in the law itself, or in the reliable history of its enactment

sic aids, or must he apply the laws as written?[60] If the extrinsic aids are acceptable, are we allowed, in particular, to use the debates which preceded the acceptance of the bill?[61] Suppose a constitution, or a provision or a group of provisions, is modeled on other constitutions, are we to consider that the interpretation previously placed on the latter was also adopted?[62] Should laws violating a written constitution which prescribes a special way for its own amendment be applied in any case, or will they give way to the constitution?[63] Again, the question of mandatory and directory provisions comes up in many countries.[64]

(*o en la historia fidedigna de su establecimiento*). A Chilean commentator, Armas, *Comentario de Siete Titulos del Codigo Civil* (1886) 47, states that such a reliable history is to be found in the first project revised by a commission appointed *ad hoc*, also in Roman, French, Spanish laws, etc. He deplores the fact that Chile did not follow the example of other countries in which, on the occasion of an enactment of a code, minutes have been kept of the meetings of such commissions. Compare with this the language used in 1904, on the occasion of the centenary of the French Civil Code, by M. Ballot-Beaupré, First President of the French Court of Cassation: "But if the text (of the Civil Code) presents some ambiguity . . . I consider that the judge has the most extensive powers of interpretation; he ought not to stop to investigate obstinately what was the idea of the authors of the Code a hundred years ago, when they were writing this article or that; he ought to ask himself what it would be if the same article were written by them today; he ought to say to himself that in view of all the changes which have come about, in the course of a century, in the ideas, in the customs, in the institutions, in the economic and social conditions of France, justice and reason command the adaptation of the text, in a liberal and humane way, to the realities and to the exigencies of modern life,"—quoted by Gény, *Science et technique en droit privé postif* I (1914) 30.

[60] See *Vacher and Sons Ltd.* v. *London Society of Compositors* [1913] A. C. 107, 113, per Lord Haldane, *L. C.*: "I do not propose to speculate on what the motive of Parliament was. The topic is one which judges cannot profitably or properly enter. Their province is the very different one of construing the language in which the Legislature has finally expressed its conclusions . . . I propose, therefore, to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section."

[61] For examples of such practice see *Stuart* v. *Laird* (U. S. 1803) 1 Cranch 299, 304; *M'Culloch* v. *Maryland* (U. S. 1819) 4 Wheat. 316, 434 (Mr. Chief Justice Marshall quoting the *Federalist*); *Prigg* v. *Pennsylvania* (U. S. 1842) 16 Pet. 539, 561-2, 587, 593-4, 616, 620 (Mr. Justice Story quoting the *Federalist*, Washington's Message and public documents of that period as throwing light on the immediate cause of the passing of an act); as for English practice, see *South Eastern Railway Co.* v. *Railway Commissioners* (1881) 50 L. J. Q. B. 201, 203: counsel argued that an act cannot be construed by reference to a debate in Parliament. Selborne, *L. C.*, "That is so. It has been regretted in the House of Lords that the Court of Appeal had allowed such a reference to be made in *The Queen* v. *The Bishop of Oxford*, (4 Q. B. D. 525, 535)." On the Continent of Europe debates, statements of grounds which prompted the government to present the bill, and statements of committees reporting bills to the full house, are frequently referred to in argument and in decisions of courts; as to Germany, *e. g.* (1908) 68 *Entscheidungen des Reichsgerichts in Civilsachen* 360. Orlando, *Principii di Diritto Costituzionale* (5th ed. 1920) 54, 56, considers parliamentary debates, alongside of judicial decisions, to represent the sources of public law called *giurisprudenza*, as distinguished from "scientific law."

[62] *Brown* v. *Walker* (1896) 161 U. S. 591, 600, 16 Sup. Ct. 644, and the cases quoted there. *Cf. e. g. Kennedy's heirs* v. *Kennedy's heirs* (1841) 2 Ala. 571, 625; as to Australian practice, see *supra*, footnote 5; as to Germany, *supra*, footnote 35; as to Argentina, González, *op. cit.* 20-21, 609, 656 n. 59, and the decision of the Argentine Supreme Court cited there.

[63] *Supra*, footnotes 6, 46.

[64] Several former and present European constitutions contain on subjects of vital importance provisions without any more definite value than that of a promise.

The theory of constitutional statutes,[65] like the theory of all statutes, will have to be traced back to such medieval ideas as the conceptions of government by consent,[66] of political representation,[67] and the question of unanimity or majority.[68] There will also have to be considered constitutional documents which originally were grants.[69] The theory of grants formed the basis of the decision in a famous American case, [70] and it still retains a certain importance in the constitutional law of the British Empire.[71] On the Continent of Europe, it is necessary in the consideration of the Italian *Statuto,* and it is only owing to the breakdown of the German and Austrian monarchies that the theory of constitutional laws not enacted by representative or direct popular assemblies has lost most of its immediate importance. [72]

Apart from statutes which were more or less solemnly enacted as "fundamental," there will have to be considered numberless statutes, ordinances, rules of parliamentary bodies, and of courts; they cover a multitude of subjects of constitutional and administrative importance, including ecclesiastical law, and such rules of private law, [73] criminal law, [74] and the law of procedure, as may be necessary for the development of our science. Since the separation of private from public law is rather artificial, the boundaries, flexible in any one country, are different in different countries or at different times, and rigidity in scientific delimitation is hurtful.

It is obvious that decisions of courts are very important in the Anglo-American system. Most of Continental Europe has also been attaching more and more weight to judicial decisions; new doctrines have been worked out and adhered to; the courts refer again and again to their own previous decisions; [75] they remark with impatience that the points raised have already been settled by them. [76] In this connection should be

---

[65] Borgeaud, *Établissement et révision des constitutions* (1893) from which Jellinek drew his inspiration for his pamphlet, *Die Erklärung der Menschen, und Bürgerrechte* (1895). *Cf.* McIlwain, *High Court of Parliament* (1910) ch. I *The Fundamental Law.*

[66] *Cf.* the plebiscites so minutely prescribed by the Treaties of Versailles and St. Germain (1919).

[67] *Supra,* footnote 42.

[68] *Supra,* footnote 43.

[69] *E. g* the "fundamental laws" for each one of the 17 "kingdoms and countries," Austria, February 20, 1861.

[70] *Supra,* footnote 45.

[71] *Campbell* v. *Hall, supra,* footnote 45.

[72] See L. Ehrlich, *The War and Political Theory* (1918) 6 California Law Rev. 418, 421-2, note 11, on the violation of the Bohemian constitution by the Hapsburg emperor in 1913, and the subsequent decision of the Administrative Court.

[73] *E. g.* certain rules as to state property contained in the French, Austrian, and Italian civil codes.

[74] *E. g.* rules as to political crimes, as to disobedience to police regulations, etc.

[75] *E. g.* (1907) 64 *Entscheidungen des Reichsgerichts in Civilsachen* 200: ". . . the law of Bremen contains no rules as to the delimitation of public law from private law. Therefore, the only thing to be considered is the general principles recognized in theory and practice (*Wissenschaft* and *Rechtsprechung*) . . ."

[76] (1908) 67 *Entscheidungen des Reichsgerichts in Civilsachen* 102; *cf.* (1896) 37 *ibid.* 334; for a defense of previous decisions against criticisms, see esp. (1919)

specially mentioned the system of law developed by the French *Conseil d'État* and the *Tribunal des Conflits*. French administrative jurisprudence has, indeed, laid down rules for which there is hardly any basis in the enacted law, and by its fine analysis and constructive reasonableness it has become the much admired model for the Continent of Europe. The various administrative courts within the German Empire,[77] the Italian *Consiglio di Stato*, and the old Austrian courts of public law have developed many principles worth considering and comparing.

It seems absolutely necessary that a comparative digest of public law be compiled and kept up to date, including not only the British Empire, the United States, and Continental Europe, but also Central and South America. If we look for a model, we must adopt the American type of systematic digests. The great technical difficulty will lie in the variety of legal organization of different countries; thus, the extensive American jurisprudence of "due process of law" might find little analogy in the case

---

95 *ibid.* 237; in Italy *e. g.* Court of Cassation of Rome, *Province of Cosenza* v. *Tancredi* (1915) 40 *Foro Italiano* I 636, 637, 640, the court "remarks that this whole reasoning, which openly contradicts the most constant practice (*la costantissima giurisprudenza*) of these joined Sections (of the Court), as expounded in an uninterrupted series of decisions for so many years until the most recent days, contains grave errors . . . in the face of the true principles of law constantly defined by this highest Board." The decisions of joined Sections are, of course, of particular importance.

See further *Ministero della Marina* v. *Baittiner e Sordino* (1914) 39 *Foro Italiano* I 530, 531, Court of Cassation of Rome: ". . . As a matter of fact . . . the most developed doctrine and the most considered and latest practice of this highest Board have abandoned, and with reason . . . the distinction between the acts of government and acts *'di gestione'*" (the latter distinction based on that evolved in theory and practice in France, *e. g.* Berthélemy, *Traité élémentaire de droit administratif* [5th ed. 1908] 42-5). "And this highest Board does not believe it right to depart from such a view, no new valid arguments having been adduced to show that the solution last adopted was erroneous . . ." *Cf. e. g.* the conclusions of the *commissaire du gouvernement* in the case of *Lemonnier, supra,* footnote 35: "This is not a simple theory, but an analysis of the practice (*'jurisprudence'*) already established." *Dalloz* 1918 III, 11.

Orlando, *Le Fonti del Diritto Amministrativo,* in his *Primo Trattato Completo di Diritto Amministrativo Italiano* I (1900) 1052-5, refuses to count judicial decisions (*la giurisprudenza*) among the sources of law, or to consider such a classification formally legitimate. It would be always irregular and inadmissible; an interpretation, of whatever authority and long standing the decisions at its basis, is not a source of law since it is always permissible to discuss it and move away from it. Yet the Italian decisions quoted above seem to suggest that legal practice has been developing along other lines at least in the last twenty years. In France, and in particular in French public law, judicial decisions are recognized as the basis of modern developments. That great master of French administrative jurisprudence, Laferrière, wrote as early as 1887: "The juristic deductions, contained in the decisions of the Council of State, have changed less in spite of the changes of political régime because they have always been inspired by a great respect for *precedents*" (author's italics) "and because they have for their basis, where texts fail them, the traditional principles, written or unwritten, which are in some way inherent in our public law." *Traité de la juridiction administrative* (1st ed. 1887) p. XIII. He quotes, *ibid.* p. XIV, another French authority calling the decisions of the Council of State "the richest and surest source of administrative law."

[77] Some of them form the supreme administrative court for several states which are too small to afford the expense of separate supreme administrative courts.

of England or France. Yet, especially in view of the constitutional changes in Continental Europe, which have taken place since 1918,[78] there can be broadly determined a few general types of public organization, or at any rate, of its most important component parts, such as countries with federal or unitary organization, with monarchical or republican organization, with separation of powers of the American or of the French type, with or without an independent set of courts of public law,[79] with or without a bill of rights. These classifications would serve to group and regroup for practical purposes the rules laid down by the courts in different countries. In addition, there would be a body of rules which, however varied their contents, recur as a type in all countries (*e. g.*, election law), though sometimes under different names (*e. g.* the broad American and narrower European conception of police power).[80]

The very theory of judicial decisions as a source of law needs attention and elaboration. It has not attained a high development even in the British Empire,[81] and is only tentatively touched upon in the text-books of Continental Europe. This may be due to certain rules laid down in continental codes—although these codes deal professedly only with private law.[82] One cannot expect perfect invariability, but many suggestive comparisons can be made.

(5) *The Literature.*

The most extensive use must be made of the literature of public law in the differnt countries. By literature is meant, not only guides to practice, commentaries, and systematic text-books dealing with the various branches of law, but also historical[83] and analytical works. Jurisprudence can help us understand the direct meaning of legal rules and, by enabling us to see their interrelations,[84] show us how to adapt them to changed conditions. But we must eliminate works of a teleological character, which tell how to adapt the law to the attainment of certain ends, that is to certain social conditions, and works which judge the value of legal rules by an arbitrarily selected criterion.[85] This is not intended to detract

[78] The constitutions of the United States and of Belgium can well be considered the two prototypes of most of the constitutional rules of our time.

[79] *Cf.* Dicey, *op. cit.* ch. V-VII.

[80] As to America, *e. g.* Guthrie, *op. cit.* 73ff; as to France, Berthélemy, *op. cit.* 225; as to other countries, *e. g. Handwörterbuch der Staatswissenschaften s. v.* Polizei (Loening) VI (3d ed. 1910) 1058-68.

[81] The Judicial Committee of the Privy Council, which is the supreme court of appeal for the Channel Islands and the British dominions overseas, is not bound by its own decisions, Holland, *op. cit.* 70.

[82] *Supra,* footnote 50.

[83] A thoroughly scientific history of the public law of many European countries still remains to be written. There are, however, many excellent monographs. It would be necessary not only to take into account the history of the sources and of the most important legal provisions, but to provide the background by tracing social and economic history, at least in a degree sufficient to understand the rules of law.

[84] *E. g.* Cook, *Introduction to* Hohfeld, *Fundamental Legal Conceptions* (1919) 3-4.

[85] *E. g.* Menger, *Neue Staatslehre* (1904).

from the value of teleological jurisprudence; it is simply an adherence to a smaller plan in order to facilitate the realization of a bigger. [86]

In order to use the literature of the subject, it will be necessary to establish in how far works not professing to deal exclusively with positive law as it is, are based on the writer's knowledge of some one legal system. Thus it will be found that Duguit has in mind mainly French, and Jellinek, German, Austrian and Swiss conditions. Some writers are careful to state the limitation of their background; [87] if they are not, confusion is likely to arise.

Another problem lies in determining in how far each author bases his statements on the law as actually applied in his country, rather than on his understanding of what the law would be if it did receive the interpretation which he desires to place on it. However antiquated some rules of statute law or some pronouncements of courts might appear to us, [88] they must for the time being be recognized as existing, although we might like to criticise the legislators or judges from whom they emanated. At the same time, literature is, at least in some countries, an important guide to practice. While not enjoying the high standing of some few old English authorities, certain writers are quoted in German judicial decisions in a way which forbids us to neglect their works.

On the other hand, writers on comparative public law do not seem to have attempted much more than a merely mechanical comparison. A beginning has been made by Esmein, [89] but his work does not contain a satisfactory study of the medieval origins of some most important ideas; it limits itself largely to a study of those ideas which have become prominent in the development of modern French constitutional law. Administrative law (including the vast subject of police power and of public welfare law), ecclesiastical law, and particularly what the late Professor Hohfeld called the dynamic aspect of law, have not yet been studied on a truly comparative basis. It may be useful to work out a "general part" of public law, [90] especially of administrative law, somewhat on the lines suggested by Kormann. [91]

---

[86] In the words of a modern master of jurisprudence applying the same idea to a different field of study: *"La spécialisation des compétences s'impose à nous comme une necessité de fait, si nous voulons donner à nos conclusions d'autorité, qu'une connaissance approfondie, donc limitée, peut seule leur conférer."* *Gény, Science et technique en droit privé positif,* I (1914) 18.

[87] *Ibid.*: ". . . *et que je précise même encore comme étant celui de droit civil* français contemporain." *Cf.* Orlando, *Primo Trattato Completo di Diritto Amministrativo Italiano* I (1900) 1043.

[88] *E. g.* Pound, *Scope and Purpose of Sociological Jurisprudence* (1911) 24 Harvard Law Rev. 609, on the attitude of American courts towards "rights."

[89] Particularly his *Éléments de droit constitutionnel français et comparé, supra,* footnote 2.

[90] *E. g.* as to sources, persons, acts-in-law, etc.

[91] Kormann, *Grundzüge eines allgemeinen Teils des öffentlichen Rechts* (1911-12) 44-45 *Annalen des Deutschen Reichs.* As to problems of codifying administrative law, see Orlando, *Le Fonti del Diritto Administrativo,* in his *Primo Trattato Completo di Diritto Amministrativo Italiano* I (1900) 1082-6, with particular reference to the role of scholars (*la scienza*).

We exclude philosophical and teleological jurisprudence; but the evaluations of certain writers, who do not deal with positive legal rules, may help us understand the law of their countries.

For instance, there is at present on the Continent of Europe a growing demand to place more powers in the hands of judges. [92] By contrast, in this country there has been an insistent agitation for the curtailment of such powers. In particular, continental doctrine seems inclined to concede to the judiciary in an increasing measure the right of disregarding laws, which are "unconstitutional" in the American sense, [93] whereas in this country there have been demands in the opposite direction. To find the reason for these contrary tendencies will be an important problem in the study of comparative public law. Thus, an able continental writer who has probably never read of the famous expression "government of laws and not of men" [94] suggests a return to Bracton's conception of the supremacy of the law, [95] or, as he (Krabbe) puts it, "the sovereignty of the impersonal law instead of the sovereignty of the personified state." [96] But it will not be the task of the pioneers in the study of comparative public law to supply evaluations, unless they wish to enter a different field of activity.

It would be wrong to limit the sources of public law to enactments and judicial decisions. To understand these, as well as the numberless other facts of social life which give a definite complexion to the legal organization of every country, no source of information should be scorned. Law is what people think law to be and what they act on as law. There are some conceptions, mentioned in court or in public proceedings only from time to time, but surviving tenaciously in the popular mind and appealed to as occasion arises. [97] These may be pure historical reminiscences or shadowy pretences, but they may at the same time have a firm grip upon the judges and statesmen who, again, are the children of their country and their age.

---

[92] The so-called movement in favor of "free law" in Austria and Germany; the French movement, *supra*, footnote 59; the Italian movement as to which see Gény, *Méthode d'interprétation et sources en droit privé positif* I (2d ed. 1919) pp. IX, X.

[93] *Supra*, footnotes 5, 44.

[94] *Marbury* v. *Madison* (U. S. 1803) 1 Cranch 137, 163. It would appear that the tradition here once more given expression ("The government of the United States has been emphatically termed a government of laws, and not of men") goes back, through Coke, to Bracton.

[95] *Rex autem non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem. Cf.* 3 Carlyle, *op. cit.* 12, 92-3.

[96] Krabbe, *Die Lehre der Rechtssouveränität* (1906) 47, 254, and *cf.* the remarks of Preuss, *supra*, footnote 28. *The Floyd Acceptances* (U. S. 1868) 7 Wall. 666, 676, 677 per Mr. Justice Miller. *Cf.* the very similar language in Berthélemy, *Les méthodes juridiques* 73-6, translated in L. Ehrlich, *The War and Political Theory* (1918) 6 California Law Rev. 418, 437.

[97] Thus, the modern doctrine of self-determination is a result of the doctrine of government by consent. Various treaties of 1919 have imposed on the governments of Poland, Czecho-Slovakia, etc., certain duties with regard to respect for the rights of national, religious, etc. minorities, and these rights have been safeguarded *e. g.* in the new Polish constitution.

A great contribution to the study of comparative public law would consist in the publication of collections, up to date both in method and in material, of constitutional and other statutes and documents which bear on public law. The difficulties of translation will be great, and it will be necessary to add the original texts. Moreover, the edition will have to be organized so as to permit constant additions as new legislation appears. In making translations, it will be necessary to see that foreign words and phrases, having the same meaning, are always rendered by the same English words or phrases.

It seems equally necessary to undertake the publication of a series of scholarly text-books on the modern public law of the several countries including its history. The text-books will have to be prepared by the foremost specialists, and the point of view will have to be unified by preparing a list of topics and questions which require an answer from the Anglo-American point of view.

It may be added that two such series [97a] are so far in existence, but that, having been written in German, for German consumption, and in some cases a long time ago, they are now out of date. Moreover, for some countries they have nothing to offer.

(6) *Theory and Practice.*

In the study of comparative public law, much attention must be paid to the difference between legal theory and legal practice. This difference is nowadays often forgotten, or referred to in a varying sense.

First—especially in Continental Europe—deductions are frequently drawn from recognized legal principles, which may appear justified by logic and yet are not true in legal practice.[98] Purely syllogistic construction ignores other important principles which in practice are recognized and acted on.[99] In England no deduction of any importance would be permitted in academic legal discussion without an authority, ordinarily in the form of a legal decision, to support it. The difference may be said to lie mainly in the degree in which logical deductions are admitted. Sometimes, indeed, even English scholars are carried away by the influence of thinkers whose abstract conclusions have no grounding in practice—as, for instance, the Austinian theory of sovereignty. But common sense generally comes into its own.

Secondly—in expounding the actual law men are likely to give way, in perfectly good faith, to their own wishes, and to assert to be law that which they want to be law.

Thirdly—we may distinguish between any books and articles, however

[97a] Marquardsen, *Handbuch des öffentlichen Rechts;* Jel'inek, Laband and Piloty, *Handbuch des öffentlichen Rechts der Gegenwart.*

[98] *Supra,* footnote 28.

[99] *E. g.* the Lippe case in Germany, (1898) Annual Register N. S. 255; (1899) 2; (1904) 284-5; (1905) 287.

scholarly and trustworthy, even if they be "authorities" in the strict English sense of the word—and the actual practice.

Fourthly—it is only necessary to recall Freeman's and Professor Dicey's [100] classical distinction between the law of the constitution and the conventions of the constitution, in order to realize that very frequently the description of public law as it appears in statutes and judicial decisions varies strikingly from the rules which, while based on that public law, determine the course of public life in an entirely different way. Compare Bagehot's famous enumeration of the Queen's powers [101] with the Queen's actual position. Compare the form in which appeals to the Privy Council are presented, with the form of judgments on such appeals. [102] Think of the German Kaiser's theoretical position as President of the German Confederation.[103] Even within the demesne of law, how many enactments actually modify important theoretical pronouncements of "fundamental statutes!" [104]

In connection with the last point, there may be pronouncements which in outward appearance are statutory rules, but, in the legal system of the country in which they have been laid down, lack any possibility of enforcement, [105] and thus, while they are usually enumerated as part of the legal organization, are in practice only blinders, put on in moments of popular excitement, and really amount to what in the case of an individual would be called a confidence trick. [106] Here may be mentioned those legal systems in which the constitution lays down a number of important safe-guards, but forbids the judges to pass upon the constitutionality of statutes. [107]

(7) *Cross-Currents.*

Professor Dicey has said: [108]

---

[100] *Op. cit.;* part III esp. 414-16. [101] *Ibid.* 464.

[102] The appeals are, in form, petitions to the Crown, and are referred to the Judicial Committee of the Privy Council. The Committee hear the case and decide to advise the King to allow or to dismiss the appeal; judgment is delivered by one of the members of the Committee in the form of a statement of grounds which prompt the Committee in formulating their advice to the King; later on, in a meeting of the Privy Council, the report is presented and on its basis the King makes an order in council.

[103] German Constitution (1871) Art. 11.

[104] *Cf.* the German statute against the Jesuits. Laband in (1907) 1 *Jahrbuch des öffentlichen Rechts* 27, and *ibid.* note 1.

[105] For instance, the "subjective public rights" of Austrian citizens were to be safeguarded against infringement by administrative authorities by allowing complaints to the Court of the Empire, *supra,* footnote 35, which, however, could not invalidate the administrative act but could only make a platonic declaration that a right had been violated.

[106] *E. g.* an Austrian "fundamental statute" of 1867 promised that the personal responsibility of administrative officials for wrongful acts done in the exercise of office would be regulated by a special law. No such law was ever enacted up to the fall of the Austrian Empire in 1918, and with very few special exceptions neither the officials nor the state could be compelled to pay damages for wrongful acts.

[107] *E. g.* Polish Constitution (1921) art. 81.

[108] Dicey, *Law and Public Opinion* (1905) 19-21.

" . . . there exists at any given time a body of beliefs, convictions, sentiments, accepted principles, or firmly-rooted prejudices, which, taken together, make up the public opinion of a particular era, or what we may call the reigning or predominant current of opinion. . . . it may be added that the whole body of beliefs existing in any given age may generally be traced to certain fundamental assumptions which at the time, whether they be actually true or false, are believed by the mass of the world to be true with such confidence that they hardly appear to bear the character of assumptions . . . The large currents . . . of public opinion which in the main determine legislation, acquire their force and volume only by degrees, and are in their turn liable to be checked or superseded by other and adverse currents, which themselves gain strength only after a considerable lapse of time."

This is one of the most important statements ever made on what determines law. It was anything but an improvement on this purposely broad pronouncement of that eminent jurist when, in the following year, Jellinek declared: [109]

" . . . It is possible that within one and the same state there should be in conflict with one another, two legal systems (*zwei Rechtsordnungen*) each of which asserts its character of a law actually in force, and not of a law which still requires to be made. But since they are based on conflicting principles and wish to regulate the same fields, therefore they must necessarily come into conflict with one another."

He then proceeds to illustrate his statement by pointing to the conflict between the *ius quiritium* and *ius honorarium* in ancient Rome, the struggle between church and state, the conflict of the feudal state with the centralizing royal absolutism, and finally the struggle of the conception of absolute monarchy with that of the "constitutional state."

Jellinek's statement is scientifically anachronistic; it uses personification without the slightest need for that antiquated procedure, and thus suggests to the reader the metaphysical, pre-scientific stage as defined by Comte. [110] It is not that there are at any time any two *Rechtsordnungen,* which struggle with one another, but that at all times there are (although in different countries in a varying degree) ideas and sentiments derived from various former ages side by side with those developed recently, and ideas adopted from abroad side by side with those worked out at home. It is precisely the constant interaction of such numberless influences, some of them confined to one or a few persons, others widespread, some due to accidental contact with other people, foreign books, or personal experiences, others the result of a long agitation or a laborious development of thought, that eventually results in the actions of judges, legislators, jurisconsults and of the people at large whose behavior is, after all, the outward manifestation of the existence of such laws. No two *Rechtsordnungen* suffice to explain the origin of modern English legal institutions—the

[109] *Der Kampf des alten mit dem neuen Recht* (1907) in his *Ausgewählte Schriften und Reden* I (1911) 396.
[110] *Cours de philosophie positive* I (2d ed. 1852) 14, 15.

Crown; the exchequer; the sheriff; the Judicial Committee [111] traceable in its present form, in a quasi-monarchical democratic republic, to the Privy Council of the parliamentary monarchy, then back to the absolute or almost absolute monarchy, and back farther still to the feudal monarchy; the evolution of representative government and the various applications of the theory of separation of powers. No two *Rechtsordnungen* account for the origin of American institutions, such as the sheriff, habeas corpus, police power, the control of the Senate over foreign relations, not to mention log-rolling, and senatorial courtesy.

There is, in the public law of every country, a great number of elements, foreign and aboriginal, old and new, expressed in statutes and judicial decisions, and traceable to various more or less fundamental conceptions of different times. It is the derivation of such elements that we try to trace—their conflicts, the compromises between them, the degree in which they become established or are forced out. It is a spectacle of constant struggle, of constant change; a spectacle which the student of the science of law must watch without passion, though with intense interest. In Spinoza's words [112]

"humanas actiones non ridere, non lugere, neque detestari, sed intelligere."

Law exists for men and through men; human psychology and human ideas make up the law; and constantly changing conditions determine men's thoughts and men's actions. We must give up all hope of seeing one consistent and perfectly logical legal system for all countries, or even for any one country. We must watch all the legal developments with the minuteness of biologists and with the sense of perspective of astronomers. Law does, indeed, remind us of the eternal problems of the universe. For in law, as in everything else in this world, πάντα ῥεῖ.[113]

LUDWIK EHRLICH

NEW YORK CITY

---

[111] *Supra*, footnote 115; *cf.* Judicial Committee Act (1833) 3 & 4 Will. IV 41; Judicial Committee Act 1844 (7 & 8 Vict. 69), etc.

[112] Spinoza, *Tractatus Politicus* cap. 1. IV.

[113] "All things flow" (Heraclitus).