Review

Law in East and West/Recht in Ost und West. On the occasion of the 30th anniversary of the Institute of Comparative Law, Waseda University. 1988, 1062 p., 20,000 yen. Edited by Institute of Comparative Law, Waseda University, Tokyo. Waseda University Press, Tokyo.

This volume is a compilation of legal treatises and is coming out as the 30th anniversary issue of Waseda University's Institute of Comparative Law. With contributions from fifty-six foreign and domestic authorities in law and eight of the Institute's own researchers, the book comes to a very sizable 1055 pages and is divided into seven sections: Law in General, Comparative Law, Public Law, Civil Law, Law of Civil Procedure, Criminal Law and Criminology, and Economic Law. The majority of the contributions are in German or English (with three articles in French and two in Russian), with contributions from thirty-six German scholars, and the contributions by professors from Freiburg University are particularly noticeable. This reflects the long-cultivated ties between Waseda University's Law School, and in particular its Institute of Comparative Law, and the German legal world.

Apart from the German language contributions, the most noteworthy are the contributions from several socialist countries. It goes without saying that in the post-World War II era of comparative legal studies socialist law cannot be overlooked. However, our sincere respect should be shown for those pioneering scholars who recognized the importance of this area and have put great effort into reopening the field of comparative studies of East and West since the Institute's original founding. In any case, publication of this volume not only bears witness to the continued existence of the Institute of Comparative Law for the past 30 years, but in addition, the volume will quite certainly become a source of considerable wealth

for the field of comparative studies, both in Japan and throughout the world.

Having used the term "source of considerable wealth," it seems appropriate to call attention to some examples from the substantial contents of the volume. However, the ability to accurately appraise advanced research covering virtually every major field of law is rarely found and due to the restrictions of space which have been imposed upon this reviewer here, such an undertaking would hardly be feasible. Within the very limited space available, I hope to give a general idea of the volume's contents as far as it is possible to do so. It seems needless to say that the authors appearing in the volume, as well as the range of subjects they address, have been well-chosen.

First, let us take a look at the writers. Each one of the numerous contributors is a scholar of the first rank, and commencing with the opening article by Müller-Freienfels, it is no difficult task to cite such well-known personages as Kroeschell, Rehbinder, Heldrich, Habscheid, Baumgärtel, Jescheck and F.A. Mann. Merely by taking a look at this list of notable authors, one may gain an idea of the volume's worth.

Next, let us take a brief look at the major subjects addressed in the volume. As is only natural in a comparative approach to any subject, selections appear from all fields of law. Likewise, since the volume serves as the 30th anniversary issue for the Institute, it follows that the contributors come from all the various fields of legal specialities. However, the title notwithstanding, the volume cannot be said to be intended as an attempted comparison, for whatever reason, of Western and Eastern legal thought. Rather, it stands as a treatment of any number of legal questions from around the world — from eight selections dealing with subjects as diverse as the role of the Supreme Court as the shaper of social strategies, standards of control, the legislative processes in constitutional democracies, to the position of the Chinese Constitution, all of which are dealt with in the Public Law section. The Civil Law section's ten selections treat fundamental questions regarding compensation problems, those arise from the physician and patient relationship and personal rights issues. The twelve selections in the Law of Civil Procedure

section deal with such basic questions as third party participation in lawsuits and the distribution of the burden of proof.

The seven selections in the Criminal Law section are all basically comparative in nature. Within the legal world, the field of criminal law in particular does not generally take well to experimentation, and thus comparative criminal law developed early. With the comparative process as a base, the suggestion seems to be that new solutions to long-standing, deadlocked points of contention may be found. Similarly, with problems now arising in relatively new fields such as telemarketing, which is mentioned in the Economic Law section, a comparative analytical approach can obviously be useful in the eventual solution of such issues. It is to be hoped that those involved in either of these fields —those seeking paths to solving old, recurrent legal questions and those seeking clues for the solution of newly spawned problems — will come into contact with this volume at some time.

To illustrate the lofty level of the contents of this volume, it is necessary to briefly cite a few examples from my particular field of expertise, Comparative Law (dealt with in Section 2), and its close relative, Law in General (dealt with in Section 1).

First of all, Müller-Freienfels' "On the Hierarchy of Legal Norms" is indeed a masterpiece worthy of the opening article in the collection. Kelsen's pure jurisprudence, which established the hierarchical relationships of legal norms which make up any legal system (thus laying clear its hierarchical structure) played a large part in returning a scientific flavor to legal study. But, at the same time, assigning a transcendent position to the Constitution it sacrificed as a result the other legal norms. One of the reasons for this lies in the advocacy, for the most part by public law scholars, of the hierarchy argument. However, when viewed from the private law standpoint, even now in the era of the "decline of the law" (le déclin de droit), the assertion by the French that the Code Civil is the "true Constitution of France" (la vrai constitution de France) stands as confirmation of just how powerful the influence of ordinary laws remains. With the inclusion of private law in any wide-ranging view of a legal system in its entirety, it is clear that the internal structural relation-

ships of a legal system are very complex and not so simple. Further, when looking at the relationship of the well-systematized codes to the other ordinary statutory laws — if one will keep in mind that the former do not necessarily always overrule the latter — it can be seen that the argument for the gradational structuring of a legal system leaves room for a fundamental re-examination thereof. The author treats this question in detail, from an extremely broad viewpoint. Replete with fresh and innovative conceptions, as well as detailed argumentations, it can justly be regarded as a distinguished piece of research. Above all, however, I would like to make eminently clear here that in my opinion this article will most certainly become a landmark for future researchers. This is not due to any reliance on the author's previously established standing as an authority, but is due to the article's inherent scholarship, which will serve to inspire our following generations and to shape their efforts for many years to come.

Let us now try to fathom the volume's value by looking at the second section; in particular, two or three theses which discuss the concept of "the law" and aspects of comparability. The Hungarian scholar Csaba Varga employs an anthropological method to examine the concept of law which occurs in comparative study of legal cultures. The concept of law as a set of abstract rules is a peculiarly Western European viewpoint, and as such, is of little use in comparative research of several, different legal cultures. Here, he adopts a much wider concept of law as "a global phenomenon embracing society as a whole," "a phenomenon able to settle conflicts of interests which emerge in social practice as fundamental" and what can be understood to be "a phenomenon prevailing as the supreme controlling factor in society." Therefore he puts emphasis on the mutually reinforcing and weakening interactions of the more legal and of the less legal and tries to find the most legal in a given society at a given time. Seen in this way, the legal norms from the viewpoint of comparative law naturally cannot be separated in toto from morals and religion.

This has a bearing on the question of comparability. Analyzing the problem of "tertium comparationis" in the micro-comparative

research, Kokkini-Iatridou finds that even if legal systems should appear to be structurally similar, the fact that different functions are performed, resulting in differing outcomes (even in the case of problems common to various legal structures) calls attention to the situation that what in one system should be handled along moral or religious lines will be decided according to legal rules in another.

This functional comparison of laws is something we have adhered to for quite some time, and we have come to think that it is possible to make comparisons between capitalist law and socialist law. However here, F. Ch. Schroeder has raised some interesting questions. For example, with the move from the nihilism of the 1920's, and with the rapid changes which came about from the creation of socialist law in the 1930's, socialist criminal jurisprudence viewed primarily responsibility and punishment as bourgeois concepts. Then, in spite of the shift toward socially dangerous act and measures for social defense, the concepts of responsibility and punishment were revived in the 30's. Later, in the Khrushchev era, the educational aspect in the criminal law moved to the forefront. In the area of divorce law, from the extreme freedom just after the end of revolution, through the severe limitations in the Stalin era, and now, in view of the more recent shift once again toward liberalization, an argument can be made for the applicability of comparative method in a historical setting. In comparisons of East and West, a shift from conceptual comparison to structural comparisons — in line with the utilization of traditionally comparative method as developed in the West — is also useful. For example, in relation to the adoption of bourgeois concepts, which can be seen in the idea of human rights, which, as far as the East is concerned, differs from the idea of protecting the individual's freedom from the power of the State, and is instead understood as the right to cooperate in the construction of the socialist society. Schroeder's work here may be said to be a critical, and most original, theses pertaining to the prevailing viewpoints of the functional comparative method.

It seems that I have all too quickly exceeded the limitations of space for this little piece. Lastly I should express my proper gratitude: first, to Professor Hideo Nakamura who acted as editor of this

volume, and to all those concerned with the project who have brought us the academic fruits of so many scholars, both from home and abroad. It is to be hoped that, this small piece notwithstanding, the reader will make the effort to examine the volume for himself or herself and discover the treasures hidden there.

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