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# Memorial Address for Rudolf Schlesinger: Delivered at the University of Trento Law School

By ULRICH DROBNIG\*

On November 9, 1996, Professor Rudolf B. Schlesinger passed away at the age of 87.

## I. The Formative Years

From his birth in Munich in 1909, Rudolf Schlesinger, to many of us just Rudi, seemed destined to become a transatlantic bridge-builder. His father, a practicing attorney, was born in Philadelphia and, therefore, *jure soli*, acquired American citizenship that extended, *jure sanguinis*, to his son.

Rudi spent most of the first thirty years of his life in Germany. After legal studies in Geneva, Berlin and Munich, he acquired his doctoral degree in Munich, *summa cum laude*, at the early age of twenty-three. He chose Professor Müller-Erzbach, an early proponent of fact-research in law, to be his promoter. The topic of his thesis in some ways foreshadowed his later predilection; he investigated how the courts applied the general clause of section 1 of the Law against Unfair Competition which, in the most general terms, forbids "actions contravening *bonos mores*." In his early professional life, Rudi served as in-house counsel to a major private bank in Munich, in which his family held a stake. In that capacity, he helped German Jews liquidate their assets and transfer the proceeds abroad. He negotiated with authorities to obtain the necessary foreign exchange permits and to solve other practical problems.

After racial persecution reached its first peak in late 1938, Rudi decided to leave Germany for his second homeland, the United

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States. At the age of 30, he started his second legal training at Columbia Law School. Given his brilliant mind, prior legal training and practical experience, it is not surprising that his results were excellent. In fact, they were so outstanding that in 1941 he, the recent immigrant, was elected Editor-in-Chief of the prestigious *Columbia Law Review*. That, of course, opened many doors. After two years of clerkships, one as clerk for the Chief Judge of the New York Court of Appeals, Schlesinger practiced law in the litigation department of Milbank, Tweed, a major Wall Street law firm.

In 1948, Rudi was called to Cornell Law School to teach Comparative Law—a new course, which was recently added to the curriculum at the request of students. He was ideally qualified for this teaching job since he was trained and experienced in one of the major continental civil law systems, then forced by circumstances to study and practice in the United States. Based on these strong bridgeheads, it was for Rudi as the comparative scholar to construct a transatlantic bridge between the worlds of common law and civil law. Firmly anchored at Cornell, where he remained until his retirement, Schlesinger “lived” comparative law for more than twenty-five years. After his retirement, he continued to teach at Hastings, almost to the end of his life.

## II. Professor Schlesinger's Legal Achievements

What are the comparative legal achievements that account for Rudolf Schlesinger's reputation as a grand old man of comparative law?

### A. *The Teacher*

I suppose, in Rudi's own estimation, teaching comparative law must have occupied the highest rank. His fame as a gifted pedagogue is legendary. I am privileged to confirm this reputation from personal observation. In the fall of 1959, when I was in Ithaca to assist Rudi at the beginning of his common core project, I attended many of his comparative law classes. He taught comparative law by the case method, based on his own casebook. Throughout each class he held the full attention of his students by instigating lively discussions and employing the Socratic method at its best. Not only did he master several legal systems, but he was able to draw on his own practical experiences in Germany and New York to muster exotic but real cases. One of his outstanding virtues was his ability to illustrate the

interplay between substantive and adjective law, based on his forensic experience in the Old and New World.

The special quality of Rudi's course is reflected in his comparative law casebook that was first published in 1950 and is now in its sixth edition. Later editions of the casebook were edited by Rudi in cooperation with other prominent teachers of comparative law. The book is a success story and widely used in American law schools. It comes as no surprise that the chapter devoted to comparative civil procedure, where Rudi, in an imaginary dialogue, appears as Professor Comparovich, has been described by my colleague Hein Kötz, a definitive authority in this field, as a "pedagogical masterpiece."

### *B. The Legislator*

As a particularly well-qualified expert with a practical bent, Rudi must have rated highly the use of comparative law for legislative policy. It is an enlightened domestic legislator who, in preparing major legislative projects, is willing to learn, positively or negatively, from foreign experience. For years, Rudi served as consultant to the New York Law Revision Commission. His advice was particularly sought for comparative evaluation. In the mid-1950s, the great legislative issue was whether the Uniform Commercial Code (UCC) should be adopted by the states. Pennsylvania was the first state to do so. However, the prospects for eventual America-wide success depended decisively on the position which the state of New York, as the leading commercial state on the East Coast, took. New York did not make a rash decision. Its Law Revision Commission subjected the draft Code to an extremely thorough examination, producing some 2,200 printed pages of comments on its nearly 400 provisions.

Rudi contributed two reports entitled "Documentary Letters of Credit" and "The Uniform Commercial Code in the Light of Comparative Law." The first report discussed article 5 of the UCC and was based upon Rudi's expertise as a banking lawyer in Germany and similar experiences in New York. The latter report was of a more fundamental character. Using comparative methodology, it discussed the merits and demerits of a partial codification. It remains quite topical in contemporary Europe where the idea of a European codification of contract or patrimonial law is being discussed. Rudi's report convincingly refutes the typical prejudices of common law lawyers against codification, but it also points out the limits inherent in any legislation.

### C. *The Common Core Project*

Finally, in his common core project, Rudi put comparative law to academic use. This is of direct interest to those involved in the Trento Common Core Project. As I see it, both these common core projects possess aspects worthy of discussion.

One aspect is the objective pursued by these collective research efforts. Rudi started from the observation that most comparisons of law are bilateral and limited to small topics; accordingly, the resulting comparative insights are equally modest. Therefore, more ambitious comparisons aiming at broader insight must be multilateral, multipersonal and topically broad. Only on such a broader basis would it be possible to arrive at "general principles of law," the existence of which is assumed by article 38(c) of the International Court of Justice Statute.

The ambivalent term "general principles" was used by Rudi before an audience of public international lawyers; he later replaced it with the narrower and more precise "common core." The intention underlying the use of both terms is reasonably clear: comparative law should aspire to identify rules which are shared, at least potentially, by all legal systems. It is a return to the universalistic spirit of the famous First Congress of Comparative Law held in 1900 in Paris, where similar ideas were propounded. Such broad comparison of the law was not entirely without models. The most prominent models were the two masterpieces of Ernst Rabel: the two volume *Das Recht des Warenkaufes* (*The Law of Sale of Goods*), the comparative basis for the elaboration of the Uniform Sales Law of 1964, and the monumental four volume *The Conflict of Laws: A Comparative Study*. Both treatises are of virtually universal coverage.

Another aspect of Rudi's common core project was that it employed a genuinely innovative methodology. It is both so original and unique that common core research is invariably understood as combining the substantive claim for universality and the specific methods that Schlesinger developed and applied to achieve it.

Rudi's method required two things. First, a collective effort was necessary. Rudi, who was neither equipped with an institute nor an assistant in the Continental style, needed a group of researchers. However, he did not look to American experts in French, German or Italian law. Rather, he recruited experts from those countries or regions of the world that he intended to study. Second, the methodology required a factual approach. Rudi was conscious of the need to

establish a team representing a broad spectrum of legal systems an unambiguous "common focus," which we would today call the "*tertium comparationis*."

Confronted with employing either abstract legal concepts or "segments of life," he opted for the latter. As a lawyer he went even further: rather than choosing a sizable, functional segment of life, he broke down life situations into "units which normally constitute the facts of a case." This "case-oriented factual method" is the essence of the common core method. Incidentally, it was myself (and later another young colleague from the Max Planck Institute) who selected and abstracted the cases that formed the basis of the famous working paper in which experts reported their national solutions.

How relevant is the common core method today, almost 30 years after its inventor's first and only product, two volumes entitled *Formation of Contracts: A Study of the Common Core of Legal Systems*, was presented to the public? Originally, Rudi planned a broader project, namely to discover the common core of the law of obligations, and especially of contracts. I do not know why he did not realize this wider aim, but I suspect that the sponsor lost interest. In fact, the Ford Foundation granted, as far as I remember, one million dollars to Rudi's project. Perhaps they thought the result was somewhat disproportionate to the cost of the project. Even from an academic point of view, it was perhaps unfortunate that so many fine minds employing a very promising method applied it to a rather narrow, technical and simple area of the law.

From a theoretical point of view, Schlesinger's common core method is, of course, optimal. The use of a case-based factual approach ideally specifies the *tertium comparationis*, both for creating a common ground for a multinational group of researchers and for demonstrating the potential interplay of rules from various branches of the law. And the *viva voce* grouping of foreign native lawyers ensures that the maximum of formative legal elements, Rodolfo Sacco's legal formants, is activated. In practice, however, the time and expense necessary for covering broader areas of law in this way seems prohibitive.

Based upon years of experience with a rule-based legal comparison used to establish common cores of rules, one may express a note of doubt about the existence of the aforementioned alternative. In fact, no enlightened comparison, especially in the presence of colleagues from the world of the common law, can effectively operate without regular recourse to the discussion of case-based issues of real

life segments. Admittedly though, a more frequent and systematic recourse to the case-based factual approach may be desirable.

Naturally, it would be even more welcome if, contrary to my earlier pessimistic assumption, it was possible to collect the necessary funds and enlist collaborators for an unqualified, full application of Rudolf Schlesinger's path-breaking common core methodology. The Trento project seems to be in this fortunate situation. They have the opportunity to demonstrate, once more, the enormous potential of Rudi's approach. It is most fitting, therefore, to remember *hinc et nunc* Rudolf Schlesinger, the intellectual inspirer and patron of today's Trento project.