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Comparative Law—Its Functions, Methods and Usages*

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Let me thank you heartily for your invitation and for the opportunity to talk to you about a field of legal learning which has held my attention for more than forty years, the field of comparative law. Even though its functions, methods and usages may not be entirely familiar to legal practitioners and scholars of even high professional achievement, I think I can assume that it is generally known that comparative law has something to do with the world outside of our own country, that it is concerned with law not as the legal system of the United States of America or of Canada, or France, or any other single country, but that it is concerned with law as a supra-national phenomenon.

The University of Arkansas is an apt place to discuss such a phenomenon of supra-national significance. It was through a former president of this university, J. W. Fulbright, now distinguished Senator from Arkansas and Chairman of the Senate's Committee on Foreign Relations, that American studies of world affairs have received a decisive impetus and that a host of lawyers, American and foreign, have been enabled to engage in studies of comparative law. Your speaker has been one of those who, under the Fulbright scheme, has gone to work and to teach law in countries East of the Atlantic and West of the Pacific Ocean, and to whose own university here in the United States the Fulbright scheme has year by year brought the stimulating company of foreign students and foreign colleagues.

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What have we Fulbright scholars and Fulbright students in law been doing when we work in comparative law? What, indeed, is comparative law? I shall answer these questions by taking you through those successive stages through which one has to go if he is engaged in work of comparative law.

The first stage for each comparatist must be the study of his own law. No American can be a comparatist before he has gone through a full course of training in American law. This proposition may seem to be self-evident. Apparently, it is not self-evident to all the makers of American law school curricula. In an increasing number of American law schools we can find courses on comparative law as part of the curriculum that leads to the regular academic degree in American law. Most of these courses are properly placed in that curriculum. It can only be to the good of the future American lawyer when at least once during his study of American law he is made aware of the fact that outside of the United States laws are different, and that our ways of administering justice are not the only possible ones. It will also be stimulating for him to obtain a survey of the legal systems that can be found in the various parts of the world. But a more ambitious effort to teach details of a foreign legal system, or worse, of several of them, to an American student who is not yet at home in his own law, cannot be anything but a road to dangerous confusion.

Comparative law, in its second stage requires the study of some foreign law. But which of the legal systems which are presently in force in the world shall be studied? In a sense each of the 132 sovereign countries now existing has its own system of law. In fact, several countries have more than one system. Here in the United States each of our fifty states has its own law, in addition to the federal law. In the United Kingdom, the law of Scotland differs from that of England. In Lebanon each of the sixteen recognized religious communities has its own law and its own court.

Fortunately, all these different laws can be grouped in families whose members are, more or less, all linked to one single mother law, and which thus tend to resemble each other to a more or less considerable extent. The two principal groups are those of the common law and the civil law. The common law family is that which has its common origin in the law of England. Of that large family our own law is a prominent member, along with the laws of such countries as Eire, Canada, Australia, New Zealand, India, Nigeria, Kenya, or Fiji. Of

course, these laws differ from each other. The rules and institutions of present American law are not the same as those of England or Ontario. In India or Pakistan those branches of the law which are concerned with the family have been shaped by Hindu or Moslem religious traditions. In the former British parts of Africa disputes arising out of that rapidly dwindling part of native dealings which is still carried on in traditional native ways are still to some extent judged by native customs. But in spite of all divergencies a lawyer from the United States can without much difficulty carry on a meaningful conversation with one from England, Zambia, New South Wales or any other common law country. They have all been brought up in the same tradition, they use the same basic concepts, their minds tend to operate along the same paths.

But let an American lawyer carry on a conversation with a colleague from France, Mexico, Germany, or Japan and he is likely to find himself caught in a maze of confusion. Even if both speak English, he is likely not to understand what his partner is talking about or, even worse, he will misunderstand him. His partner has been brought up in a different mode of thinking, of approaching problems, of looking at the sources in which the rules of the law are supposed to be expressed. In fact, a lawyer from Germany or Switzerland may not find it easy to converse with a colleague from France, Italy or Argentina. All the civil law systems are conglomerates of medieval European customs and the learning about Roman law that, after having been lost with the fall of the Roman Empire, was rediscovered in the twelfth century. But the customs were different in different parts of Europe. That fact accounts for some differences. Others, more significant ones, are due to the fact that the complex mixtures were reduced to systematic codes which were made at widely different times. The oldest, that of Denmark, was promulgated in 1683; the latest ones, those of Greece, Poland, Czechoslovakia, Portugal, Syria and a number of African countries, date from recent years. Of these codifications two have served as models for most of the others, the French Civil Code of 1804 and the German Civil Code of 1896. The latter, being almost a century younger, is both more refined and more expressive of modern needs and ideas. One who has worked his way into the legal system of France should be able without much difficulty to get along in those of Belgium, the Netherlands, Spain, Chile, the Congo, or Viet Nam. The student of German law should encounter little difficulty in under-

standing the laws of Switzerland, Turkey, Japan, Korea, Scandinavia or any one of the socialist countries of Europe, even though the last named ought to be understood, as far as content is concerned, as expressions of the political and economic tenets of Marxism.

Among all the legal systems of the world we thus distinguish between the two great families of the common law and the civil law, and within the latter the two groups of the French and the German patterns. An American comparatist will thus have to acquaint himself with the legal system of France or Germany or both. He will then hold the key to any other legal system to which he may feel himself attracted by professional need or by inclination.

Familiarity—please note that I do not say acquaintance—with at least one of the principal foreign systems constitutes the indispensable basis for comparison. But what do we compare? On the most elementary plane we can compare rules and institutions of different laws. On that plane it is irrelevant whether the several laws belong to different families or systems or to the same.

We may, for instance, compare what steps must be taken to establish a corporation under the laws of Arkansas, Illinois, England, France and Ghana, or what formalities are required under these laws for the effective execution of a will, or how to initiate and conduct a law suit.

Such comparison may be of practical importance in advising a client, and it may not be easy to carry on. The investigator has to know where to find the materials and how to read them. That may not be possible without acquaintance with the particular country's legal system as a whole. The mere reading of a statute or a treatise, or even worse, of a translation, may be thoroughly misleading.

More sophisticated is the comparison of legal terms and concepts. "Mortgage" is a word of the English language. Can it be used as a translation of the French word "hypothèque"? The two terms seem to be equivalent, but on closer investigation it turns out that, while they have a common core, they have different fringes. Is the English term "consideration" equivalent to the French term "cause"? The answer is again: to some extent yes, to others no. Does "marriage" or what goes as its equivalent in another language mean the same in the legal systems of the United States, Italy and the Soviet Union?

Even words of the same language may have different meanings in different legal systems. Until 1938 the German words "scheidung" and "trennung" had different meanings in the legal systems of Germany and Austria. In the law of Germany "scheidung" meant divorce and "trennung" meant separation from bed and board. The Austrian terminology was the opposite. Incidentally, the person who in English and American law is called "plaintiff," is called "pursuer" in Scots law.

Problems of this kind can be crucial in the translation of a statute, a judicial opinion, an international treaty, or a business contract. The attorney who advises an American firm in negotiations with a firm abroad must know in what meaning a legal term appears in the framework of a foreign system, and he must be loath to assume that it can always be rendered by simply translating it into what may be believed to be its equivalent in American legal parlance.

Of even greater complexity is the comparison of what I shall call "approaches." Let me explain what I mean. In every legal system of the world, or at least in every modern system, contractual promises are enforced. If Mr. Borrower has taken a loan for $1,000, promised to repay it on January 1, 1968, and fails to do so, the creditor can go into court. If he proves the facts he will be given judgment and if Borrower still fails to pay, the sheriff will come and levy execution on the television set or the farm, or Borrower's bank account or claim for wages may be garnisheed. If Borrower tries to resist, the sheriff or his deputies will break the resistance with force and, if necessary, may call out the posse or the National Guard or the Armed Forces of the United States.

The enforcement, or the threat of enforcement, in this literal sense is a necessity in a society in which the economic system is based on credit. But shall every promise be enforced through the full might and power of the government? People make all sorts of promises: "I'll see you for lunch next Monday"; "I'll drop your letter in the mail box"; "We'll follow up the civil marriage ceremony with one in church." A man may promise to pay a gangster $10,000 if he puts away his wife, or to provide a counterfeiter with a printing press, etc. No court anywhere will enforce such promises. In that respect, American, French, German and probably all other laws are in agreement. But in what terms is the refusal to be articulated? American courts are likely to talk about consideration, its lack or its illegality;

French courts will talk about "cause"; German courts use no such over-all term but resort to several different categories.

In what respect do these techniques differ? Why do they differ? Which is most likely to achieve socially desirable results? In every legal system it is taken for granted that one who has been illegally injured by another is entitled to receive damages. But when is an injury "illegal"? Nobody doubts that a motorist who has driven through a red light at eighty miles an hour and has smashed into another car has acted illegally. But what about the drug company which has manufactured a new tranquilizer and has observed the traditional precautions, but the children of thousands of mothers who have taken the drug are born deformed? Should the firm be liable if it has continued selling the drug after receiving some information indicating that there might possibly be some dangerous effects? To what extent, if at all, may business firms try to maintain prices by such devices as retail maintenance schemes? Should a person who has entered public life be entitled to damages if a newspaper has published some damaging information about him which turns out to be false?

American law approaches such problems in a fashion similar to those of the criminal law. Just as a criminal code enumerates and defines those acts which, and which alone, subject a person to punishment, Anglo-American law has developed a catalogue of torts the commission of which subjects the actor to the duty to pay damages. So we have such torts as trespass, assault, battery, negligence, libel, slander, unfair competition, malicious prosecution, conversion and whatnot. The definitions are, of course, not one hundred percent precise. Cases occur where it is not clear whether or not they fall within any of these pigeon holes. Then the courts must come in and, as time goes on, a body of case law grows over the skeleton of the several torts. But the skeleton is still there as the bones from which the courts have to start in their deliberations.

French law, to be more exact, the French Civil Code, pursues a different technique. Exactly one section of the 2,281 of which it is composed tells the courts under what circumstances damages are to be awarded for a tort. Article 1382 states: "Every human act which causes harm to another obliges the one through whose fault it has occurred to pay damages".

That provision is devoid of meaning until it is given meaning by the courts. The French law of tort has thus developed as a body of case law, leaving to the courts a freer reign than

that given to them in Anglo-American law, which, as popular theory has it, is a pure case law, but where, in fact, the courts are guided, often closely, by traditions of long standing. How can we account for this strange phenomenon that in the field of torts in France, the very prototype of a code country, the courts have more freedom than in countries of the common law, and that an intermediate position is occupied by the law of Germany? How do these different approaches work out in actual practice? Which has proved itself to be best suited to do justice? Which is the best to allow the adaptation of the law to the continuous changing circumstances of life?

We are led to the more comprehensive question of defining, explaining and evaluating these various ways of articulating the law in different legal systems. What indeed differentiates a codified law from a case law? Does codification have the same effects at all times and at all places? Do California lawyers use their code in the same way French lawyers use theirs? Does a French lawyer of 1968 treat his code the same way it was treated in 1804? What has become of the German code when it was used as a model in Japan and Korea, or of the Swiss Code when it was transplanted to Turkey?

And what about cases? They play an enormously important role in France, Germany and other civil-law countries. But are they handled in the same ways everywhere? Here we meet the most crucial, but also the most subtle problem of comparative law. What is the difference between the ways in which the legal mind works, the attitudes a judge or an attorney takes when he is confronted with a problem? The ways of the common-law mind are different from those of the civil-law mind. When a European-trained, young lawyer comes to the University of Chicago for graduate study, I invariably tell him: "Try to forget that you have ever studied law. Never approach a problem in the way in which you would approach it at home. You are likely to go astray." This prescription is not easy to follow. But when it has been followed and the American way of legal thinking has been grasped, the student will make a discovery: In the field of private law some eighty percent of all cases come out alike, irrespective of whether they come up in a court in the United States, in Canada, in France, in Argentina or in Japan. After all, our civilization is a unit, the problems are the same and so are the solutions. But the common base shows variants: the American, the German, the Spanish, etc. They account for the twenty percent different decisions, and for

the differences in the methods of legal thought. To explore both the common base and the variations, their causes and their results is a task full of fascination.

In no small measure are the variations of legal thought and method the result of differences in the machinery of the administration of justice and in the training and the personality make-up of the personnel. Common law procedure is modeled upon the premise that the case will be tried to a jury. Much of our substantive law has been developed by appellate courts in the shape of decisions determining whether a certain question is for the jury or for the judge. This fact has given a peculiar tinge to much of our substantive law. It has largely been responsible for the detail into which such broad standards as reasonable care, constructive notice, or contributory negligence have been broken down. Jury trial has also been the cause for the development of a special law of evidence, which as law students have discovered, is one of the most complicated. Jury trial also has produced a peculiarly flamboyant style of advocacy and peculiar techniques of trial tactics. In civil-law countries trial by jury is a rare exception in criminal cases and never used at all in civil matters. Instead, we there find various kinds of mixed bench composed of both career judges and laymen. The latter are partly experts in commercial affairs or representatives of groups such as employers and employees, or, especially in criminal cases, they are average lay people just like American jurors. But they sit together with the professional members of the bench and deliberate together with them all questions of fact, of law, of damages, or of punishment.

In all the countries of both the common law and the civil law, procedure, civil and criminal, is of the adversary nature. But in the civil-law countries, the powers of the judge are more comprehensive, and they are even stronger in the socialist countries. While we believe that the true state of facts can be found out most effectively in the process of examination and cross-examination conducted by the parties' attorneys, civilians, and even more so Soviet jurists, believe in the likelihood of the truth being found out better through the judge's active participation in the examination of witnesses and in the entire conduct of the case.

Comparison of the roles played by judges and lawyers in the conduct of law suits, the preparation of legal documents and the counseling of clients shows that the occupants of offices in the administration of justice do not everywhere harbor the

same images about their functions. A German or French judge, not to speak of one in the Soviet Union, is more likely to conceive of himself as a functionary of the government than an American judge, who is easily inclined to look at government as the Leviathan against whom the citizen must be protected. How have such different attitudes developed? What reflections can be found in the law of differences in legal education, in selection for judicial office, in social origin of law people?

The problems that present themselves for comparison are innumerable. For some the answers can be found easily by anyone who has gone through the not-so-easy task of working his way into a foreign legal system. But most of the problems are complex and subtle, and compel the comparatist lawyer to dig into history, to engage in studies of economics, anthropology or sociology, or to establish working relationships with colleagues from these disciplines. But what are we to do with the results of our endeavours? Of what use are they, if any?

Being a professor, I would state first the usefulness our insights have in and by themselves. They are answers, mostly tentative ones, to man's insatiable quest for knowing his world. They are as valuable or as useless as the insights obtained in such sciences as comparative religion, comparative linguistics, biology or physics. They simply satisfy our curiosity.

But the insights of the theoretical sciences have been put to practical uses. Medicine is based on biology, technology on physics and chemistry. In law, international practice is based upon comparative law. The American lawyer who wishes to advise an American client in matters such as export-import deals, international transportation, supra-national financing, or doing business abroad need not be an expert in every detail of the foreign law involved. But he should know its basic institutions. Above all, if he is successfully to negotiate with a foreign partner or through a foreign lawyer, he must understand the foreign legal mind. He ought to know how it operates, how arguments are made, what terms are used and what they mean. Results can easily be disastrous if the American lawyer naively assumes that his foreign colleague thinks and argues in the ways to which he is accustomed, or that he uses terms in the same sense in which they are used in American legal parlance.

Not so obvious, but at least as helpful, is the suggestive force of foreign law for the handling of one's own. Time and again I have been told by former students of the Chicago Foreign

Law Program that it has opened for them new vistas of American law. If considered in its familiar American context, a client's case may look desperate. But familiarity with a foreign law frequently brings to the mind an approach which, while unusual in the American framework, can nevertheless serve as an effective argument.

But the most obvious use of comparative law within the framework of national law is in the field of law making, judicial and legislative. In most countries of Europe it is common practice in the preparation of any major legal reform to engage in extensive study of foreign ideas and experiences. In the preparation of the family law reform that is presently in progress in the Canadian Province of Ontario, extensive studies are utilized of recent developments in the United States, Scandinavia, Germany and other countries. Recently I participated in a conference in Louisiana in which, for purposes of a comprehensive reform of the private law, papers were presented on foreign challenges and experiences, and a course of extensive studies will be undertaken in that state in its newly established Institute of Civil Law Studies. In New York the Law Revision Commission, and in England the Law Commission, are constantly engaged in studies of comparative law. Nobody, of course, intends simply to enact a statute that is found to work successfully in some other part of the world. But suggestive ideas can be derived from it and equally so from foreign experiments that have failed. Why, indeed, should one repeat what has turned out to be a mistake elsewhere?

I hope I have suggested to you that comparative law is a field of practical utility and, above all, one that is full of intellectual challenge. I hope at least some students of law may ask the question of how to get there. There are several avenues, all of which have one common presupposition. Any one who wishes to engage in comparative law work, must know languages. The very minimum is a complete reading knowledge of French, or German, or preferably of both. Better is a knowledge of additional languages, such as Spanish, Russian or Chinese.

Familiarity with foreign law may be obtained either through trial and error, *i.e.*, actual work in a law firm engaged in international practice. A better way is that of systematic study. The American law graduate may go to France or Germany for study there. He will find that two years is the minimum and that the first year is likely to be wasted. The organization of

legal studies is so different from ours that an American student is likely to be lost unless he is individually guided. And how is he to find such guidance? Besides, even if he thinks he knows the language, he will have trouble in following lectures, participating in discussions and writing term papers.

A few American law schools have therefore followed the example of the University of Chicago and established special programs of training in French, German, or other foreign law such as Soviet, Latin-American or Chinese. These programs are arduous. Admission requires language facility and an eminent academic record.

My work in the law extends over fifty years. I have been fascinated by it and I am still fascinated. I have found fascination when I once worked in German law, and again when I have been working in American law. But the greatest fascination and the greatest intellectual satisfaction has been found in comparative law.