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THE TASK OF COMPARATIVE LAW IN COMMON LAW SYSTEMS

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It is most fitting that the last of this wide-ranging series of lectures should bring us home again to the Common Law, for it may well be that one end, at least, of the rainbow we seek rests in our own back yard. My purpose this evening is to consider with you three closely related questions: the task and function of the comparative method in common law systems; who should be responsible for performing that task; and how it could usefully be done.

When we speak of comparative law we think, primarily and properly, of comparison in space, between the existing law of this country and of that. Some of us, however, recognize a second relevant dimension of the comparative method in that it may also exist in time. In time its interest is perhaps more academic and historical than immediately practical, but not less valuable on that account to the training of a broad, legal mind. To follow to the very frontiers of the Common Law the pedigree of such bodies of rules as the mining law of California, for example, would take us on a romantic and exciting journey. We could follow those rules backwards in time through the gold rush of the mid-nineteenth century to the Stannaries of Cornwall and accompany the immigrant Cornishmen who brought their customary mining law across an ocean and a continent to the Pacific Coast. We could trace the development of these rules yet further back to the time when the mines of Cornwall supplied the ancient Phoenicians with tin. There is great interest in legal comparison in time. But what we may not have realized is the third dimension of the comparative method, that of depth. In this dimension we may compare the fundamental principles of a legal system with the day-to-day manifestation of its particular rules. Much of your constitutional law appears to me to be an unconscious application of the comparative method in its dimension of depth. All three dimensions are relevant to comparison within the Common Law.

The remarks I have to make are set within the context of the three great unities which bind us together in the common law world—those of law, language and political thought. To these unities we may well add another. Certainly within the Common Law, and indeed beyond the

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boundaries of our legal world, there is a unity of common problems, problems which have been growing in extent and intensity since the end of the last war. Instances of contemporary transnational problems are all too easy to recall. They include general problems of juvenile delinquency; problems created by the shortage of housing; problems of the vast involuntary movement of populations; problems of protection and control of currencies; problems of international industry and commerce involving cartels and monopolies; problems of taxation; problems of international and constitutional law through the emergence of new and independent countries such as Ghana and Cyprus; problems of public international law in the sense that we need a common language of international law, and a common understanding of it within the common law area of western civilization; problems, again, of jurisdiction; problems created in our age by the ease of movement over long distances.

The Task of Comparison

It may be useful to remind ourselves of some of these problems as we glance over a few of the main branches of the Common Law. Where should we start but with land law itself? Here the common problem that faces us in common law jurisdictions is that of shaking off the shackles of a feudal past, so that land may be liberated to serve a useful contemporary purpose in this age of exploitation of resources, in which for the most part we have moved from an agricultural to an industrial and commercial type of society; an age in which land has turned from a two dimensional into a three dimensional concept. We may most usefully compare land law in common law jurisdictions, finding in some of them a movement away from the ancient and traditional classification into real and personal property toward a concept of property generally, whether immovable or movable. This tendency we can find strongly represented in England since 1925. Its latest manifestation takes the form of proposals for the amendment of the law relating to the formal validity of wills.[1] On the other hand, we find some systems, such as that of Northern Ireland, which have preferred to retain the earlier rules of land law. Between these two extremes there are many variations in which such concepts as heirship, seisin, dower and curtesy survive.

In the field of personal property we have learned much from one another in dealing with problems of bankruptcy and negotiable instruments, but our problems are still common and our solutions may well be improved by comparison. There is, for example, a difference of treatment among common law states in respect of a motor car which has been

1. Private International Law Committee, *Fourth Report,* Cmd. No. 491 (1958).

sold subject to the lien of the vendor for the unpaid balance of the purchase price. Depending on marginal variations of fact, the problem presented by the common situation may be represented legally in several ways, for example, as a conditional sale or as a chattel mortgage.

In the field of trusts we have much to learn in England from your experience in dealing with the problem of effective administration of small trust funds. The method long established here of the common trust is little known in the United Kingdom and the value of comparison in this field could be correspondingly great.[2] In the Common Law you have moved further than we in England both in the protection of privacy from interference and, I believe, in the intensity of problems you face in that field. You have enabled the third party beneficiary under a contract to recover within a limited field, and here again provided a precedent which could be of value in other jurisdictions.

The field of family law presents constant and ever more urgent problems in an increasingly industrial and congested society. When one adds to this type of society the domestic upheavals caused by two great wars, it is obvious that in this field the world, or at least the common law world, is facing enormous problems of a common kind. The consciousness of the width and implication of these problems led the University of Chicago to devote some of its best talent to research into the problem of the stability of the family, the legal aspects of which were in the able hands of one of my predecessors in this series, Professor Max Rheinstein. This group of problems is one in which not only lawyers but non-lawyers too, notably sociologists, psychologists and economists, must work together to save the institution of the family from decline. The areas of useful and profitable comparison within the field of family law are at least five. One thinks first of divorce, in its grounds, in the bases of jurisdiction to pronounce it, in the reality of domicile on which such jurisdiction is normally based, and in theories of divorce which go far to explain differences of approach from what is virtually consensual divorce on the one hand to complete denial of divorce on the other, such as one finds in Eire. Again, in annulment of marriage we come to a field that has been too little explored. We find distinctions in England between void and voidable marriages that do not exist in any jurisdiction within the United States, principally because they derived from the treatment of marriage in two different jurisdictions in England, namely, those of the common law and of the ecclesiastical courts. There is a conspicuous difference of emphasis and of treatment in the fields of

2. The Times (London), February 7, 1958, p. 9.

legitimacy and legitimation, responding to either adherence to or freedom from historical principles, responding (at least outside the motherland of the Common Law) to the need for adaptation to new geographical and social conditions. Again, in the rules governing adoption we find great diversity in different countries and ample scope for positive improvement in many systems within the common law world. Finally, among the broad topics one might mention in family law is that of the maintenance and support of both wives and dependent children, legitimate and illegitimate. This is a problem of great difficulty because of the traditional bases of personal jurisdiction over a person liable for support and because of the economic difficulty, if not impossibility, of the person deserted to enforce her rights against the deserter in some distant land. This is a problem which has been of great concern to international organizations, not merely within the common law world, for the past quarter of a century. It is a problem which you in the United States and we in England have endeavored to solve in our separate ways, and it is one in which genuine cooperation and exchange of information are much needed.

In this brief mention of some of the branches of law in which the comparative method could well serve a valuable purpose, constitutional law deserves more than the few words we can give to it. The written constitution in the common law world differs from that anywhere else in that it has to fit into a common law tradition of judicial precedent and judicial interpretation. This is true even though, in the spirit of Chief Justice Marshall, a constitution has to be construed more liberally and more broadly than an ordinary statute.[3] It is of great interest to see how the federal constitutions, first of Canada and then of Australia, were founded on the pattern, the lessons and the experience of the United States Constitution, and how they in turn have influenced other constitutions, such as that of India, which itself is established on the pattern of your own Constitution. This common pooling of public law is of great importance and has been of great value, for it has led to striking similarities in the constitutional structures within which the whole life and thought of our respective societies have their being. Possibly constitutions are more conspicuous as legal instruments than other statutes of more modest scope. Be that as it may, the comparative method has certainly been applied more consciously and more conspicuously in constitutional law than in most other fields. It is only necessary to mention United States or British Commonwealth constitutional law to realize the scope of comparative law within it.

3. McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

Special mention should be made of one field in which comparison plays a leading and difficult role. The importance of comparison in the conflict of laws derives from the very nature of the subject, involving, as it does, the relation of several legal systems or jurisdictions, and in which the impact of different rules of law is particularly frequent and decisive. From the end of the last century, when problems of the conflict of classifications and definitions of concepts were first brought to light, the need for comparison, unification and understanding within the field of conflict of laws has become increasingly acute. It is only necessary to mention a few of the problems within the range of this subject to establish the value of comparison. If we turn again to family law in its interstate and international dimension we realize how fundamental is the function of the domicile of the person in questions of jurisdiction and application of the personal law. Yet it is notably in questions of domicile that great differences of concept are met, quite apart from differences of rule.[4] The value of comparison appears most noticeably in the consideration which was given by the English Royal Commission on Marriage and Divorce to the question of the domicile of a married woman.[5] Under English law the married woman has always had the same domicile as her husband (though this principle may soon be changed by statute). Generally speaking, in the United States, she only has his domicile when husband and wife are living amicably together in the same State. A bare statement of this technical difference hardly reveals the numerous cases of hardship caused to deserted wives when their husbands have acquired a domicile in some other state and jurisdiction in divorce depends solely on the principle of domicile. In such circumstances either the wife must do without a divorce or must bring proceedings in the only state in which she is domiciled, a state she may never have seen or visited, which is the state of her husband's present domicile. The United States' solution of allowing the wife to have a separate domicile from her husband has solved this particular hardship problem in an effective way, but not without paying the price of some complexity in giving concurrent divorce jurisdiction to courts of the domicile of each of the parties. Again the value of comparison may be shown in the recommendations of the Lord Chancellor's Private International Law Committee dealing with domicile.[6] The recommendation is that the traditional English doctrine of the

4. GRAVESON, THE CONFLICT OF LAWS chs. 2, 4 (3d ed. 1955); *In re* Annesley, [1926] 1 Ch. 692.

5. Royal Commission on Marriage and Divorce, *Report 1951-1955*, CMD. No. 9678, paras. 825, 894 (1956).

6. Private International Law Committee, *First Report*, CMD. No. 9068 (1954); for comments see Graveson, *Reform of the Law of Domicile*, 70 L.Q. REV. 492 (1954).

revival of domicile of origin should be abandoned in favor of what is in effect the United States rule that an existing domicile should continue even after abandonment until a new domicile is acquired. It is gratifying to record the influence of United States practice and United States decisions in the discussion and recommendations of the English Committee.

We may turn for other instances in this field to rules governing the validity of contracts or liability in tort. There is diversity in common law systems as to the acceptability of the doctrine of the proper law, that chosen by the parties, to govern the essential validity of a contract. Broadly speaking, this concept is wider in English law than in the United States. Its value, however, has been recognized in both federal[7] and state[8] decisions. Again, if we turn to the rule governing liability in tort, we may find a simplicity in United States doctrine of the applicable law which is denied to English judges; for this is one topic in English law in which the undesirable practice of a double test is applied. Liability in tort in the English conflict of laws depends upon the alleged wrongful act both constituting unjustifiable action or omission by the law of the place where the act was done or should have been done, and secondly, conformity to a tort according to English internal law if it had been committed in England. There has for years been dissatisfaction with this English rule. It is a problem in which the experience of United States courts should be carefully considered, although the American rule of governing liability by the law of the place where the tort was committed disguises by its apparent simplicity the preliminary question of where the tort is committed. Nevertheless, it is a simpler and, for that reason at least, a more satisfying doctrine than the English.

There are many other topics in the conflict of laws in which comparison pays high dividends. Conflict of laws principles are the signposts to the application of the legal systems of various countries and states and quite obviously an acquaintance, at least, with the method of comparison is an essential working tool of any lawyer, teacher or practitioner. Indeed, he is faced not only with questions of substantive law, but with questions of evidence and proof, and in this area too the comparative method has proved its worth. It is a principle of the Common Law that the law of any other country is to be regarded as a question of fact to be proved by evidence of an expert kind, and not as a question of

7. Pritchard v. Norton, 106 U.S. 124 (1882); Siegelman v. Cunard White Star Ltd., 221 F.2d 189 (2d Cir. 1955).

8. *E.g.*, University of Chicago v. Dater, 277 Mich. 658, 270 N.W. 175 (1936); Green v. Northwestern Trust Co., 128 Minn. 30, 150 N.W. 229 (1914); Auten v. Auten, 308 N.Y. 155, 124 N.E. 2d 99 (1954).

law. How difficult can be the task of proving foreign law is illustrated by one or two English cases involving the doctrine of renvoi, and most notably in *In Re The Duke of Wellington.*[9] In that case the English court was directed by its rule to apply to the succession to land the law which the court where the land was situated (Spain) would apply. The evidence indicated that the court of the situs had not yet had to consider or decide this particular question. The English court was, therefore, faced with the need for deciding as a question of fact what the foreign law would be or would have been if the foreign court had had to consider the question. United States courts appear to follow generally the principle that the Common Law of another common law jurisdiction should be judicially recognized and assumed to be the same as that of the court, but this presumption does not apply to statute law. It may well be that by comparison of the various attitudes to foreign law, a more rational and general body of principles could be evolved. One would think, for example, that a presumption of similarity of Common Law is not too exaggerated for general adoption, despite the differences that exist and which could always be proved as a matter of fact.

It is particularly where the topics of conflict of laws and federal constitutional law overlap that comparative law is of enormous value in reducing the area of dissimilarity and removing some of the inevitable tensions of a federal system. Even without going into the field of conflict of laws, there are many points of useful comparison in this country between federal and state law and procedure. To a foreign observer the case for applying the comparative method in the United States, particularly to problems of conflict of laws and constitutional law, seems unanswerable.

Behind these and the other individual branches of law we come to the fundamentals of the common law system, foundations which themselves should not escape comparison. We come to the relative positions of the judiciary and the legislature, to the method of electing or appointing judges and to the question of the independence of judges and their status in society. We come to the important question of respect for the law and the popular attitude toward judges, courts and legislatures, which is one of the important psychological bases for observance of law and order within a legal system. We come, in fact, to the philosophy of values which underlies and permeates a legal system. Little has been done in the way of comparative philosophy within common law systems. Yet I can imagine few studies that could be more interesting or intel-

9. [1947] 1 Ch. 506.

lectually rewarding than that of taking the seventeenth century values of the English common law and tracing their influence and their modification through the history of their evolution in the many varied contexts in which they have flourished. The philosophical and historical appeals of such an investigation are clearly realized. But the practical importance for contemporary common law society of an assessment of our system in terms of fundamental guiding principles and the significance of our unities has more than intellectual appeal. It has the mark of urgent need upon it.

That, in briefest outline, is the case for maintaining that the comparative method would be useful within the common law system. We may add that it would not only be useful, but that it would be relatively simple to apply because, as Roscoe Pound has said, the tradition of the Common Law has given to common lawyers a common language wherever they meet so that they may read one another's books and study one another's cases with profit and with understanding. In a historical sense it may well be true to say that common lawyers are comparative lawyers despite themselves and even though they may not know it, because their whole training is based on the comparative development of principles derived from English law. It may be that, like Molière's Monsieur Jourdain, they have been speaking the language of comparative law throughout their whole legal career without realizing it. However, it required a French comparative lawyer of distinction, the late Professor Lévy-Ullmann,[10] to tell the English that they had always been a nation of comparative lawyers from the Middle Ages, when first the teaching of Roman Law began in our universities. We may add to this factor another of some importance, that over wide areas of the Common Law there exists a common nationality. That nationality may be United States citizenship which spreads around us in fifty common law systems, or it may be British nationality which covers many countries throughout the world. These are factors which facilitate as well as necessitate the operation of the comparative method in the legal provisions and devices by which each of the countries attempts to solve its problems.

By the comparative method we have been able in England to improve our substantive law and one can equally imagine the possibility through this method of improving procedure and the judicial process. So far as substantive law is concerned I would merely refer you to the recently published Fourth Report of the Private International Law Com-

10. LÉVY—ULLMAN, LE SYSTÈME JURIDIQUE DE L'ANGLETERRE (1927); see the writer's comments in GRAVESON, L'OEUVRE JURIDIQUE DE LÉVY—ULLMAN 164-5 (Paris 1955).

mittee.[11] In reaching its recommendations for a change in the law of wills the Committee took into account the experience of the Uniform Model Execution of Wills Act of the United States and the Ontario Wills Amendment Act, 1954. The Report invites the views of all Commonwealth countries on its proposals, and the result will, it is hoped, be a basis for an international convention of the Hague Conference of Private International Law. In matters of procedure, practice and pleading we have much to learn from comparison of such matters as written briefs or oral argument, or the need for the judge to sum up evidence of fact for the jury. There is interest and challenge in the diversity of methods one finds among common law systems in the employment of the jury. It is well known that the use of the jury in civil actions has been almost abandoned in England since the war, and that we have found this a salutary change. Of course, the jury is retained in criminal cases. In the field of evidence valuable comparative work is already being done.[12]

The extent to which the French Civil Code of 1804 spread throughout the world and influenced the course of legal development in many countries has its legislative counterpart within the common law systems. In two respects we can see the problems with which comparative law has had to deal and the success of its solutions to them. In the nineteenth century a code of criminal law and criminal procedure was drafted in England by Sir James Stephen for application to India. This code is still the basis of Indian criminal law and has been applied with such local variations as were needed throughout a large area of the British Colonial Commonwealth. It is even possible that the Indian penal code, with its content of English criminal law, will be introduced into certain African colonies, at present subject to Mohammedan criminal law, when they attain their independence in the not too distant future. Although this is a striking instance and example of model legislation being applied over widely divergent territories it is not the only case, for in several fields model legislation has been applied on a common law basis to various colonies and colonial territories of the United Kingdom side by side with such local customary law and customary courts as there may have been. This particular problem has been of practical importance in British colonial government, and I think that the challenge it presents has been successfully met. It has at least been met in the sense that in those African colonies to which the model legislation of the Colonial Office has been applied, there is as they emerge to independent nationhood a sound

11. CMD. No. 491 (1958).
12. Nokes, *Codification of the Law of Evidence in Common Law Jurisdictions*, 5 INT'L & COMP. L.Q. 347 (1956).

and solid basis of common law principles and well tried legislation on which to found the development of an independent legal system within the common law world.

The second respect in which legislative comparison has earned high dividends is in commercial and maritime law. Your Harter Act of 1893, provided a useful pattern of legislation for other countries, including Canada and the United Kingdom; while on the other hand the English Bills of Exchange Act, 1882 and Sale of Goods Act, 1893, have provided patterns of law in these fields which have been widely followed both in the United States and in other common law jurisdictions. Indeed, they have been found acceptable even in non-common law jurisdictions such as South Africa, where English legislation in the fields of commercial law, criminal law and procedure has been adopted, but subject to a modified civil law doctrine in the tradition of Roman Dutch law.[13] Although the appeal of legislative borrowing is more obvious than that of judge-made law, because a statute may constitute a comprehensive and fairly self-contained body of rules, and because its transference may appear more simple by reason of the legislative pattern in which it appears, there are nevertheless important limitations, chiefly political, on the extent to which such transference may take place. As a source of comparative material it must stand in our minds alongside case law, which every common lawyer would characterize as a kind of transnational common property. Much legislation in our time is of a political nature, or political origin, since so much of it is concerned either with keeping the promises of the last election or preparing the electorate for the next one. But where legislation is not conditioned by the local political context, where, in other words, it deals with the living body of the Common Law as a system, we find more useful material for comparative legal analysis. Of what one might call political legislation, however, it is only fair to say that sometimes it bears the character of a legislative solution to a common social problem. Insofar as it does this it is clearly desirable to compare it with one's own solution to the problem in order to discover which answer better deals with the question presented.

There has been too little writing in the Common Law on the problem of legislative drafting and legislative techniques, and certainly on the problem of the comparative method in relation to this topic. Nor is Roguin's theory adequate to achieve all the desired ends of the comparative method in the Common Law. It was, indeed, well for Roguin to underline the limitations of the legislator's mind and to show how his

13. Graveson, *De L'Influence de la Common Law sur les Systèmes de Droit Civil Existant dans le Commonwealth Britannique,* 5 REV. INT'L DROIT COMPARÉ 658 (1953).

choice of possible solutions to a given problem was limited by his experience and his imagination. But the logical possibilities of Roguin become the empirical possibilities within the Common Law, and the possibilities of different solutions to the same problem are multiplied beyond one's immediate experience and sometimes beyond one's imagination by a simple inquiry into the legislation of other common law countries.

This sharing of experience has many advantages. Its first and most manifest is the improvement in the legal system of that country which chooses to examine other legal systems. But there are deeper and more enduring values at stake than the improvement of a single legal system. This process of comparison is within the oldest and best tradition of the Common Law in which all those who practice the art are members of a brotherhood, sharing experience and helping one another towards the solutions of the various problems that they face. This, indeed, is a tradition one can still find at the English Bar and, I expect, in the United States. It is a tradition which can well be applied on a nationwide scale or even on an international scale among those systems which are endowed with the Common Law. It has, further, the great value of increasing mutual understanding, mutual sympathy and mutual respect within the common law world. It is this feeling of a common heritage, partitioned but not reduced among so many beneficiaries, which teaches us how to disagree without being disagreeable. It is, I suggest to you, this common law heritage which accounts for the absence of war for almost the past century among states and countries endowed with the Common Law. It is a unique feature of the common law world which must be the envy, or at least the surprise, of those systems founded upon the law of imperial and militaristic Rome.[14] There is not only this tradition of understanding conceived in a common language, but there is a responsibility for the future. It will be a strengthening of all those, whether individuals or states, who bear this responsibility to understand better one another's legal systems, and to be ready to learn from one another how this heritage of the Common Law has been used in various places. In the increasing standardization of life that we face today not only in its benefits but in its problems, it is common sense to look to a broadly based legal system such as the Common Law to discover how we may best take advantage of the opportunities it presents for a higher general standard of living as well as for the solution of our urgent, sometimes worldwide problems.

14. Graveson, *Philosophy and Function in Comparative Law*, 7 INT'L & COMP. L.Q. 649, 654 (1958).

WHERE RESPONSIBILITY LIES FOR DEVELOPING LEGAL COMPARISON

I have spoken sufficiently of the need for development of comparative law. I should like now to say a word about the bodies and institutions whose responsibility it is to satisfy this need, to fit the ordinary lawyer to fulfill his duty to clients and to his society as a progressive citizen. There are in my view three main bodies who must satisfy the demand for an application of the comparative method to modern problems. The first of these is the practicing bar in the various common law countries. It is gratifying to note that in the post-war years there has been a much greater consciousness among practicing lawyers in many countries of the need for comparative analysis of problems and for the establishment of positive studies in this respect. This can be seen not only in the establishment of such world-wide bodies as the International Bar Association and others of a similar geographical compass, but also in the meetings arranged within the area of individual bar associations and the establishment within them of committees charged with a particular responsibility for matters involving comparative law. This is the case in the American Bar Association, and there is a similar committee existing in the English Law Society. The responsibility of the American Bar Association for the setting up of the American Law Institute and, before that, the institution of the Commissioners on Uniform State Laws, is evidence of the conscious need for solutions by way of comparative law. The recent establishment in England of the British Institute of International and Comparative Law,[15] a body comprised of judges, practicing and academic lawyers, is equally evidence of a positive approach to the problems in this field. Perhaps nowhere more than among practicing lawyers is there an awareness of the common fund of precedent, the common traditions which unite them across state borders and the value of looking still further afield when one's own law fails to provide an answer to a client's insistent question.

In the second place, it appears to me that a responsibility rests on international organizations to promote the use of the comparative method in the solution of problems of international dimensions, even though many of those problems can not, in a technical sense, be called those of international law. First in this regard one thinks of the work of UNESCO. The International Association of Legal Science of UNESCO, on which Professor Yntema and I at present represent the world's common law systems, has done what it can within the limits of its funds to promote a study of comparative law with a view to greater understanding

15. See prefatory notice to 8 INT'L & COMP. L.Q. (Jan. 1959).

among peoples, to relieve tensions between East and West in the terms of the resolution of Montevideo, and in showing the effectiveness of the reception of one legal system into a very different situation. This is a study which is being particularly devoted to the success of the reception of Swiss, Italian and German law in Turkey, but it is a study that equally could be applied to the reception of the Common Law throughout the common law world. Indeed, the United Kingdom National Committee of this international body has devoted itself during the past few years to a study of the expansion of the Common Law and its development in different parts of the British Isles. This has led to useful comparative work and to a greater awareness of the need for mutual understanding within the immediate area in which I live. One would like to think that it has led to the consciousness of different and better solutions to common problems.

Among the international bodies we might mention with responsibility in the field of comparative law, the Hague Conference of Private International Law and the Rome Institute for the Unification of Private Law hold a high place. In a more modern sense and on a more political level we may note the work with respect to the unification of law of the Arab League, the Nordic Council and other international groups; and yet again on the level of international organization of the non-political kind we can see how the pressure of human and social needs has led to a comparative approach to different laws and to the gradual unification of law. This is manifest in the work and the area of operations of the Food and Agriculture Organization and the International Labor Office, as well as in many of the other international organizations which have been established since 1919, and particularly under the United Nations Charter. Although these international bodies admittedly are not concerned exclusively with comparative law within the area of Common Law, many of them are concerned to consider the Common Law as one of the prime factors in their daily calculations.

We are, in order (of alphabet, not of merit), brought to the third group of institutions responsible for the development of comparative law, namely, the universities. They are not responsible merely for the undertaking of work in this field. They have a more general responsibility for the training of all lawyers who are going to apply the comparative method to the legal problems of everyday life, whether on a local, national or international basis. It is gratifying to record that the universities have, at least to a modest degree, been conscious of their responsibility in the teaching of comparative law and in the promotion of research along the lines of the comparative method. There is evidence of this at-

titude in many places and in respect of many topics. It is unnecessary to recite them all, but I think it worth mentioning in a representative fashion the comparative studies that have been carried on in Michigan Law School, particularly in relation to the commercial law of South America; the work of the Parker Institute of Comparative Law, in Columbia Law School; the project, to which I have already referred, in the University of Chicago, relating to the stability of family; the work in criminal law of Professor Hall here at Indiana and of the Gluecks at Harvard, where comparative law is also strongly represented by Professors Berman and von Mehren. We may note the concern in Tulane Law School with the relations of the Common to the Civil Law and the special comparative interests of Cornell, Yale and New York University. May I add that there is considerable interest in the faculties of English universities in comparative law both as a subject and as a general method of teaching? This is certainly true of the University of London, where, I believe, the Quain Chair of Comparative Law was the first English chair in the subject, and in which the comparative method in the field of common law and international subjects has long been regarded as a normal and a natural approach, particularly at the postgraduate level.

One wonders, nevertheless, how universities have succeeded in doing all they have done in view of their inadequate staffs, and in view of the difficulty many have found in obtaining proper recognition for the subject of comparative law. One answer to this question is that lack of recognition has never stopped a university teaching anything it wished to teach if it is a free university and has men of courage on its faculty. Secondly, although comparative law may not have appeared under that particular title, it is a method which has been applied widely and for a long time in many excellent law schools. In this sense, comparative law is a disguised subject. It is merely the language in which any legal subject may be taught, and probably better taught than it otherwise would be. Despite the discouragement that comparative law has received at times in the past, the increasing recognition of its importance has led in England to the establishment of chairs of comparative law in a number of universities and has similarly led to the recognition of the subject in many of the leading law schools in the United States. It is, in my view, important that proper recognition of the significant academic and practical function of the comparative method should result in wider establishment of the teaching of the subject in both our countries.

The need for expansion of comparative law representation in the universities can be shown in respect of undergraduate teaching, postgraduate study and research. In English universities undergraduates are

introduced to comparative law in the first year of their degree courses without even knowing it. For in all law schools except one, not only is Roman Law compulsory as a first year subject, where it is generally contrasted with English institutions, but the comparative method is applied in another first year subject, constitutional law, in respect of the comparison of the constitutions of various Commonwealth countries. In the second and third years of their law school courses, comparative law plays a part more as a method than as a particular topic. At the post-graduate level it is appropriate to provide specific courses on the comparative method for those students whose interests lie in a wider sphere than the law of their own state, whether the path they take be that of practice, of teaching, of international government service or of international commerce. And finally, it is important, perhaps most important of all, that those undertaking research into the problems of today should know how to take advantage of the solutions and the methods of other legal systems, and that law teachers in the universities should have had training in the methods and the processes, in the limits and the problems, of comparative law.

There is need for more writing and more material in this field, and I stress the field of comparative common law. We have in this country a fine journal devoted to comparative law and in England a quarterly which is, I hope, a useful medium for the subject. But there is scope for more publications. Speaking in 1934 of the place of comparative law in the American law school curriculum, Dean Pound observed, "that an apparatus of comparative law in the hands of well trained teachers who know how to use it may make their work more effective in the everyday teaching for the first degree in law and very much more effective in graduate instruction."[16] May I ask whether any of my listeners would care to compare the succession laws of Indiana and Alaska and express an opinion on which of these systems better serves the interests of the family or of society? Again, may I inquire within this single country whether the wife's property rights were more favorable to her in Maine or in New Mexico? One might ask whether Michigan or New York had a better solution to the problem of the automobile bought on credit and pledged or sold in another State. Such questions could be multiplied many times, as we all realize. I pose them merely to indicate the existence of many topics of research in comparative law within the common law systems around us, where an impartial and objective assessment of dif-

16. Pound, *The Place of Comparative Law in the American Law School Curriculum*, 8 TUL. L. REV. 161, 163 (1934).

ferent solutions to common problems might well lead to a general improvement of the law.

Methods of Developing Comparative Legal Studies

How, then, should we tackle the problem of comparative law, which seems so important yet so relatively neglected? I would like to suggest to you that we follow the well-tried way of going into the unknown from the known. We know already, both in the universities and the courts, the value of precedents from other jurisdictions. This is our key to the legal world beyond our own state lines. In the context of our subject, the application of this method would be to spread outwards from one's own legal system. For me, as an English law teacher, this will be to start from the law of England, to spread outwards in a comparison with other common law systems around me in the British Isles, for example, the law of Northern Ireland, the law of Eire and, outside the common law field, the law of Scotland. From that point it would be natural to move outwards still further into the common law systems of the British Commonwealth and to consider, as I have tried to do,[17] the impact on civil law systems within the Commonwealth of common law traditions and common law institutions, such as that of the sovereignty of parliament and the doctrine of precedent.

From your point of view, the obvious starting point would be the law of Indiana; from Indiana it would be natural to compare the legal systems of your neighbors, and so beyond them into any of the States of this country where comparison could be useful, and not merely academic. I do not favor or advocate comparison for the sake of comparing, for comparison as a method is merely a means to an end. The end is an understanding and an assessment of values and an improvement of the law. From a comparison with the law of such other States of this country as might be found interesting, it would be natural to spread to other common law systems, particularly those systems which have the common constitutional context and possibly common social problems with those of Indiana. It may well be that the problems of some of the Canadian Provinces or of the Australian States resemble, for various reasons, the problems of Indiana, and that a comparison of solutions could be of great value to all concerned. Beyond this field of the Common Law (and indeed it is an enormous area) comparison could extend. Below the horizons of the common law world it might be well to compare not just civil law systems, not just the Soviet version of civil law, but the vast area of Oriental and African laws. These, together with Chinese law, are

17. Graveson, *supra* note 13.

taught in the University of London, but there is little teaching of them in this country. For many reasons, not least of which is the emergence of new and independent states in Asia and Africa, it would seem useful to know something of their legal systems. I am told that there is no one in the United States teaching the law which today governs six hundred million people of China.

Lawyers know well that law is a very valuable path to the understanding of the life of the people. We can understand the character of Roman society through its imperialist system of law. We can understand the Common Law through the individualism of the reasonable man. We can find in Mohammedan law both a system of law and a way of life. If this is the case, it is not only a desirable thing that comparative law should lead an even wider group of minds to study other legal systems and compare the solutions for the common problems of humanity, but it becomes a matter of practical necessity in a country such as this with increasingly far-reaching international horizons and international responsibilities. One of the surprising features of comparative law in the United States has been the interest that has been shown in Soviet law. It is almost a stronger interest than that in any other system in this country, supporting at least two of the few chairs of comparative law. This is entirely a good thing, but it would seem no less desirable to extend the interest in comparative law to the understanding first of one's neighbours and then of many of many different societies, particularly those within the common law field in every other continent.

In order to undertake their responsibility for the development of comparative studies, it would seem that the universities, spreading out from their own system, as I have suggested, should try first to cover areas of comparative interest that have not already been covered. This first task is so enormous that it would appear academic in the worst sense even to mention the second. But assuming an ideal situation, the second task would be to cover the remaining areas more effectively and thoroughly. There is, indeed, no human practical limit to the extent of comparative legal studies, by which I mean comparative legal studies which can have practical value and importance. But the starting point of inquiry in any case should, if possible, be a search along comparative lines for solutions to specific problems. We may well support as a minimum program Professor Jerome Hall's proposal for regular meetings of legal scholars to deal with special subjects of study and research on a comparative basis.[18] Here is an authority in the field of comparative law

18. Hall, *A Law Teacher's Tour Around the World,* 34 N.D.L. REV. 297 (1958).

who has set before us some, at least, of the goals at which we should aim. The first of Professor Hall's specific goals would be "the discovery of a modern ius gentium—the common law of all the leading cultures of the world."[19] This project is concerned not merely with academic questions. It is of interest to remember in this connection that Article 38 of the Statute of the International Court of Justice requires that the Court should apply, among other things, the general principles of law recognized by civilized nations. Here, again, is a task for comparative law. What are these general principles of law recognized by civilized nations? May we even assume that they exist? This is a specific topic of comparative law of great importance, and it is gratifying to know that Professor Schlesinger of the Cornell Law School is devoting himself to an examination of it.[20] May we not agree with Professor Hall on the value of an American institute of law to act as a central clearing house for research in the field of these general principles?[21] May we not add to the studies of these principles the wider questions of a sociological nature which lie behind the resulting differences in rules? Professor McDougal has advocated a study not merely of rules, but of decisions and why they are made, in the field of international law. We are, in his words, presented with "an opportunity of overwhelming urgency for the comparative study of law to explore the power processes of the nation-states of the world, and to clarify the variables . . . which move different decision-makers in different nation-states."[22] This may seem a task for those concerned beyond the frontiers of the common law world, but indeed, there is much to be done within those frontiers in a useful and necessary comparison of the views taken by independent nations of common law systems as to rules of international law.

It may be appropriate to remind ourselves that the central figure in the common law system is the individual and not the state. This common law tradition is at once the solvent and one of the unities that makes comparison both necessary and possible. We deserve to be reminded in the broad sweep of our horizons that it is the individual who stands at the center of our system. We must not lose sight of him in what Pound has called "the general bigness of things."[23] I have touched on some of the main problems which we will meet within the common law field, but there

19. *Id.* at 306.

20. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations,* 51 AM. J. INT'L L. 734 (1957).

21. Hall, *supra* note 25, at 306.

22. McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order,* 1 AM. J. COMP. L. 24, 27 (1952).

23. Pound, *The Development of American Law and Its Deviation from English Law,* 67 L.Q. REV. 49, 66 (1951).

are others which should not be ignored. I feel sure, for example, that we could learn much in England by a comparison of the organization of the legal profession in other common law systems.[24] It may be that we are too fettered by tradition to operate as satisfactorily as we might do in the interests of clients and of society. It may be that the legal professions in other common law systems would find useful lessons from the etiquette of the English Bar and of English solicitors. Again, we might usefully compare methods of legal education and professional training throughout the common law world, and learn from one another both how to save time and how to produce better legal minds. These topics I must neglect, for they deserve more consideration than I can give them here. It may be sufficient to say that within the unities of law and language and political thought that I have mentioned, there is almost infinite scope for valuable comparison. There is adequate justification for the promotion of studies in this field.

My final word to you must be one of personal testimony in my temporary capacity as Visiting Professor at Harvard Law School. How is it possible for that Law School to invite a foreign lawyer to come to teach a regular course in a subject of American law to its third year students? How is it possible for an English law teacher, not unduly immodest, to accept that invitation and to believe that he could perform the task at least to his own satisfaction? The answer I would suggest lies in no unfounded faith on the part of the Law School. It lies in no wild and unjustified optimism on the part of the visitor. It lies simply in a realization, common throughout the common law world, that there is a unity which binds us together that is more important than the differences that distinguish without dividing us, and that on the basis of that unity of the Common Law it is not impossible for a lawyer from one system to discuss intelligibly the differences he finds in another system. It may even be that both he and his students can benefit from the contrasts which inevitably appear in such a process. In a divided world it is important that we should cherish the unities we possess. The values of the Common Law in terms of justice and the integrity of the individual have spread over wide areas, and have remained as a priceless heritage when the more transitory political connections with their origin have been outgrown. This is a striking feature of the British Commonwealth of Nations, as its several parts attain maturity and independence. Though they may sever political ties, as in Eire, India and other lands, the spirit of justice under the Common Law remains a constant, common bond of

24. Milne, *Organization of the Legal Profession,* 55 L. Soc. GAZ. 539 (1958).

liberty and understanding. Together we have considered some of the reasons which might well commend themselves to us for studying more deeply, more sympathetically, more widely, systems of the Common Law throughout the world. To me these reasons seem good. I hope and believe that they will also seem good to you.

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