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## THE UNITY OF THE HUMAN MIND AS A BASIS FOR JURIDICAL COMPARISON\*

The significance of a meeting of jurists coming from the most diverse countries, in this grave hour in the history of the world, cannot escape anyone. If there is a hope (and hope itself is a duty) that mankind can escape the awful fate which its technical progress might reserve for it, hope can only rest in the development and consolidation of a common moral and juridical conscience of humanity. Our attendance here, in fact, proves that we desire to work to that end. The ideal which animates each of us, and which each of us desires to serve, is justice: the same justice without which States would be, as St. Augustine said, no other than *magna latrocinia*. I am sure to interpret the thought of all Italian jurists, and particularly of those here gathered, in greeting, with a fraternal spirit, our colleagues from other countries, not only to a better mutual knowledge, but also to a strengthening of those bonds of human solidarity, which attain their most certain and solemn confirmation in Law.

Many years have elapsed since, at the International Philosophical Congress at Heidelberg in 1908, attempting to delineate the "Idea of a Science of Universal Comparative Law," I expressed the conviction that, in order to understand the reasons and aims of this science thoroughly, it would be convenient to go back to the principle of the *real unity of the human Mind*. It is not useless, perhaps, to reconfirm here, today, this principle which is indeed, if I am not mistaken, the implicit presupposition and logical foundation of all our comparative researches, including those which aim at the understanding of single institutes or particular subjects. As logicians say, there is no possible comparison between absolutely heterogeneous things; comparison being the observa-

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\* Lecture delivered on August 5, 1950 at the closing session of the Third International Congress of Comparative Law held in the Old Hall of Lincoln's Inn, London, England.

tion of what is similar and what is dissimilar in the same class or kind of objects.<sup>1</sup> Also, the perception of the different degrees of the same series involves a reference to a unity of measure. It has been said, quite reasonably, that history must be the history of something; in the same way, comparison can start only from the basis of a certain homogeneity among its objects, which exists and reaffirms itself, through the variety of its manifestations. So, juridical comparison presupposes the idea of Law, though it neither contemplates this idea *sub specie aeterni*, nor analyzes it in the abstract, but considers it in the concrete, in its manifold realizations as an element or fact of experience.

It has been debated whether the idea of Law represents a real and proper category (that is to say, a necessary truth), or an empirical concept based solely on particular and relatively accidental observations. The first thesis, if one accepts a critical analysis of knowledge, appears to be the soundest one. We are not so Platonic as to hold that every generic notion to which our intellect reaches constitutes an absolute universal, endowed with a transcendental reality of its own: as, for example, we cannot hold that besides the horse there is "horsiness," according to the famous irony. Let us admit, then, that there are *a posteriori* concepts originated, in a certain way, by the senses; though it cannot be forgotten that these concepts also imply in every case a relation with the mind or spirit which apprehends them—remember the "*nisi ipse intellectus*" by Leibniz. On the other hand, however, there are concepts which the mind draws from itself, and they have those characters of universality and necessity which experience cannot give us. One of these concepts is precisely Law, considered as a *pure form of intersubjectivity*, according to which the subject must recognize in others his own

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<sup>1</sup> This is also fundamentally the thought of Wundt, according to whom: "Das Wesen des vergleichenden Verfahrens besteht darin, dass die vergleichende Beobachtung, die Sammlung uebereinstimmender Erscheinungen und die Abstufung der nicht uebereinstimmenden nach den Graden ihres Unterschieds zur Gewinnung allgemeiner Ergebnisse benutzt wird." 2 WUNDT, LOGIK 369 (4th ed. 1920); 3 *Id.*, at 62.

quality as a subject. It becomes clear in this way—and only in this way—how Law manifests itself with more or less clarity, but unfailingly at all times and in all places, wherever human life exists: so that the field of juridical comparison is in fact as large as that of the history of man. At all times and places, Law reveals itself as a co-ordination between person and person, as a limit of reciprocal activity and as a series of rights and correlative obligations. The formal nature of this scheme allows it to include a great variety of contents, yet remaining unchanged and unchangeable. Only a superficial and paralogistic observation can lead to the erroneous thesis that *everything* is “various” in Law, forgetting, or not recognizing, that uniform and constant element owing to which, and in relation to which only, it has any sense to speak of variability.

And this is not all. If variations in the contents of Law may be thought of, abstractly, as being infinite (the formal scheme of juridicity still remaining safe and firm), the objective perusal of all juridical systems known by us actually shows us a marvelous series of coincidences and identities, even in the contents of systems themselves. The protection of the person and the limitation of his own free will, in respect to his co-existence with other persons, are fundamental motives which recur in the institutions of all peoples. The differences, as far as these motives are concerned, are noteworthy, but in a certain way secondary and often only apparent, as they result from the necessity to attain, by the various means available in each case, an identical end. We can, without giving here too many superfluous quotations, summarize what is the unanimous conclusion of all the most inclusive and accurate studies on this subject; *viz.*, that a very great part of the juridical principles and institutes is a common inheritance of humanity at all times.<sup>2</sup>

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<sup>2</sup> See DEL VECCHIO, SULL' IDEA DI UNA SCIENZA DEL DIRITTO UNIVERSALE COMPARATO 18 (2d ed. 1909), and authorities there cited.

We can say, more precisely, that a substantial concordance exists both from the static and the dynamic point of view; that is to say, that there are *uniform tendencies* in the development of the systems of the various peoples, so that, in general, each of them goes through the same phases in turn. Not that the immense panorama of the historical life of Law is lacking in peculiar characteristics and also deviations, regressions and anomalies. But this cannot prevent us from recognizing the general tendency of development; so much so, that history itself shows that sooner or later these deviations and involutions are destined to disappear, as in the disease of an organism, which cannot last forever but must be resolved in some way, by life or death. The only difference being, of course, that the death of a people is a very rare occurrence.

It is therefore possible—and here is one of the tasks of the science of universal comparative Law—to distinguish and arrange, in a certain order, the various phases of juridical evolution in general. This must be done without in any way distorting reality; on the contrary, all the peculiarities of phenomena observed in the different peoples ought to be respected, thus avoiding that excessive “historical systematicism” prompted by ideological preconceptions, which used to vitiate, as is well known, the old Philosophy of History (not excluding the work of Vico, in spite of its being a work of genius). So, for instance, it is obvious that the duration of the various periods, or rather of the various phases, in the historical development of Law, cannot be established *a priori*, as it is connected with particular circumstances in the life of the various peoples. It is most important that, with respect to the real course of juridical phenomenology in general, the modes of development of the successive transition should be set in a certain order, thus fixing the types resulting therefrom. While the history of a particular system naturally follows a chronological order, here, considering the proper office of the science of universal comparative Law, the design

must have a *metahistorical* character: consequently, in the description of a given phase, there can and must be included the examples offered, without synchronism, by ancient and modern peoples who were or are precisely in that phase.

To admit the essential identity of the mind in its constituent forms, and in the tendencies of its development, means to recognize that no exclusion, either of epochs or of breed or race, is justified if we want to determine exactly the program of the science of comparative law. It should be well understood that even inquiries limited to a few systems or institutes can be useful and sometimes extremely valuable, but in any case they must be considered as fragments with respect to the foregoing more general design.

Consequently, we need not condemn the limitations of the field of inquiry ensuing from the practical necessity of the division of work, because of the natural restrictions of individual strength and brevity of life. What should be condemned, instead, is the prejudice that only certain systems of Law are "worthy" of study, and that, therefore, the comparison must be limited to them. This prejudice had various manifestations in ancient and recent times and obtained such a predominance—in spite of the contrary attitude of some broadminded thinkers, such as Leibniz, Feuerbach and Amari—that only in very recent times did it become possible to constitute effectively the science of universal comparative Law. Let us mention in this connection, with due honor, the names of Maine, Post, Kohler, Lambert, Wigmore, Gutteridge, to which others should certainly be added.<sup>3</sup>

The work that has been done in this relatively short time is far from small; yet, what still remains to be done is very

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<sup>3</sup> Concerning the beginnings and progress of the studies in comparative law, see GUTTERIDGE, *COMPARATIVE LAW* (2d ed. 1949); WESTRUP, 4 *INTRODUCTION TO EARLY ROMAN-LAW COMPARATIVE SOCIOLOGICAL STUDIES* 185-201 (1950); Pollock, *The History of Comparative Jurisprudence*, 11 *JOURNAL OF THE SOCIETY OF COMPARATIVE LEGISLATION* 74-89 (England 1903). See also, DEL VECCHIO, *op cit. supra* note 2, and Del Vecchio, *Sulla Comunicabilità del Diritto*, 18 *RIVISTA INTERNAZ. DI FILOSOFIA DEL DIRITTO* 6 (Italy 1938).

much indeed. One of the difficulties of this work is that the various juridical systems often have very different structures and expressions, so that, to make them exactly comparable, it is convenient to reduce them, shall we say, to the same denominator. There are, for instance, systems in which legislative form predominates, and others in which a great deal of room is given to custom, even in advanced phases of civilization and in fundamental matters, such as, for instance, the constitution of the State itself. There are systems which contain precise declarations—though, in fact, only partial—of the so called general principles of Law, and others in which such principles are only understood, leaving to interpreters, and especially to judges, the task of deducing them from their own conscience or from the spirit of existing laws. Quite rightly, then, the existence of certain “implicit premises” of the various law systems has been noted; premises which, sometimes, are not formulated, but are nevertheless important for a sound comprehension of the systems themselves and their parts.<sup>4</sup>

Thus, singling out and comparing the different data, the science of universal comparative law is able to discover, even in the case of institutions both geographically and chronologically distant, that *basis of humanity* which is common to them and which becomes ever more evident with the progress of civilization. This is due to the fact that rationality, implicit from the beginning, but in the first phases almost enveloped and concealed by extrinsic and accidental elements, reveals and affirms itself by degrees, transforming itself progressively into uniform general principles. The spontaneous convergence of developments is gradually facilitated by the increase in the possibility of mutual borrowings and derivations between different systems. At the same time, compari-

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<sup>4</sup> On this subject see ASCARELLI, *PREMESSE ALLO STUDIO DEL DIRITTO COMPARATO* 10 (1949). See also Del Vecchio, *Sui Principi Generali del Diritto*, 85 *ARCHIVO GIURIDICO* 1 (Italy 1921).

son effectively shows the identity of the psychological origin of Law and its communicability among peoples.

The science of universal comparative Law is not and cannot be a mere catalogue or inventory of laws which existed or exist, at every time or in every place. It certainly gathers all the historical elements which possess the stamp of juridicity; but, contrary to history, it sets them in their own place in the order of development of the human mind, which is substantially an order of values. Consequently, this science, far from equalizing the primitive juridical institutions with those more rationally evolved, makes their respective inferiority and superiority evident, that is to say, their different degree of humanity. It is true that some phenomena of regress occur in the vicissitudes of the life of peoples, and that some barbaric forms sometimes reappear in the law systems of the so-called civilized countries, as has recently happened; but it is also true that no criticism is more efficient for stigmatizing these forms than to demonstrate that they belong to an historical phase already surpassed. Human conscience reacts almost inevitably to the anachronistic *monstra legum*, through the unconquerable and always reviving strength of reason; which is, as the Poet said: "Like the leaf—That bows its lithe top till the blast is blown—By its own virtue reared, then stands aloof." <sup>5</sup>

The science of universal comparative Law, therefore, grows ever more important, both theoretically and practically, as the systems of law to which it refers are perfected and advanced. With the illustration of the highest points attained by juridical thought—*viz.*, of the laws which are the richest from a rational and humane viewpoint—this science becomes a guide to further progress and offers a kind of model for further improvements and reforms, wherever the opportunity

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<sup>5</sup> DANTE, PARADISO 24.85-7.



or the need is observed. It is, therefore, an efficient instrument for the progressive unification of the positive law of the various countries. Such a goal is undoubtedly far off, yet it is clearly perceivable by means of the steps already made in its direction. The United Nations Organization is still imperfect and of uncertain stability (in fact, it does not even include that nation which was the teacher of Law to all others, and which, as was said by the Secretary-General of this Congress, Professor Elemer Balogh, is "the second Fatherland of every jurist"); yet one cannot but recognize that the UNO stands as a great attempt to approach that ideal of the political co-ordination of mankind, which had flashed across the minds of ancient philosophers and which, today more than ever, is keenly felt as a vital need by the most enlightened minds in every country. We must also remember, in this connection, the manifold partial agreements concluded with increasing frequency, not only between single countries, but also among large groups of countries, in order to give a uniform juridical regulation to specific matters of common interest. Finally, the fact that in the internal systems of law of civilized countries the juridical value of the human being, independently of his nationality, has been solemnly established, is of very great importance so that the difference between citizens and foreigners, in their relation to private law, has been reduced to a minimum in the most advanced countries. Unfortunately, the recent world conflagration and the present uneasiness have prevented further progress in this matter, and have even caused some regress; but if reason prevails over madness, and the love of peace and justice over the bestial instincts of plunder and domination, we can surely expect that, after overcoming the crisis of today—as others were overcome in the past—humanity will resume its upward march towards a society of free and equal nations, which will not be the "Monarchy" as conceived by Dante, but will answer that need of

supernational unity which inspired the greatest Poet, more than six centuries ago, with his great design. Even today his maxim is valid, and remains eternal: "Totum genus humanum ordinatur ad unum." <sup>6</sup> And even the Bible, as Dante himself remembered, had said: "Omne regnum in seipsum divisum desolabitur." <sup>7</sup>

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<sup>6</sup> DANTE, *MONARCHIA*, 1.5(7).

<sup>7</sup> *Luke*, 11:17; *Matthew*, 12:25.