CHAPTER VII

Comparative Law Research in India

> "I sometimes feel that we accademic lawyers are all too easily seduced by the lure of laws as a *jeu d'artifice* or as a *jeu d'espirit*, a box full of highly intellectual games played in an artificial vaccum so as to sharpen everybody's wits without being too much troubled by the realities behind it".[1]

Kahn-Freund's above observations is accompanied by an eloquent exhortation that the academic lawyer has the *nobile officium* to do that which the practicing lawyer has rarely the time to do, that is, "to place himself both inside the mechanism which the law uses to maintain its continuity, and outside it, outside the network of legal arguments, and at a detached point from which the law appears in perspective, as a product shaped by society whose needs it is destined to serve."[2] With a disarming simplicity Kahn-Freund maintains, "The satisfaction of the felt needs of society through the law is, in my submission, the cardinal subject of all academic legal studies".[3]

We reiterate the same view and would like to chart out a programme for future research in India aimed at the satisfaction of the felt needs of our society. But before that a word on the other field of research, which though not conforming to the above sociological view, is not entirely barren. This we will call : the jurisprudential view. The merits of enquiry from this angle are obvious. It would help us acquire a better understanding of the historical roots of our own law; thus enabling us to grapple with the modern problems in proper perspective. Also, it would give us an insight so that we can distinguish the basic, essential ingredients of rules from those trappings of pseudo-scientific norms that come into existence through accidents of history and tradition.

On the jurisprudential level one can make a comparative study of law as custom and law as command. The sanction behind custom is connected with notions of God-ordained justice and depends upon the cohesiveness of the community. The sanction behind law as a command, on the other hand, is conceived of as force. The study of this interesting shift from law as custom to law as command would be very useful in the Indian context. One could investigate the pre-British Indian reliance on morality and social ostracism as sanctions behind community law and the changes that alien rule brought about in them. We can go even further and see as to how the

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1. O. Kahn-Freund, "Comparative Law as an Academic Subject", 82 *L. Q. Rev.* 44 (1966).
2. *Ibid.*
3. *Ibid.*, 61.

invading Muslims themselves had injected into the Indian society their own views on the sanction behind law. The interaction between law as custom and law as command will surely yield rich dividends in a country which was under alien rule.

Another interesting study could relate to the impact of foreign law in an alien legal system which is commonly known as "reception". Reception of foreign law could be direct and deliberate as in Turkey, Japan and some South American countries. But in a country which was formerly a colony, it assumes a more complex nature. An alien ruler normally is concerned with revenue and the maintenance of peace and order. Therefore his natural concern would be with laws relating to taxes, land revenue and crimes. Generally the personal laws are left alone. But in India, the British seem to have left a deep mark on some traditional institutions, like the Islamic Waqf, with their English notions of Trust. Again, the customary system of Zamindari in India, which probably had ownership as the basis was modified with the British ideas of land ownership. More broadly it is interesting to speculate whether the British with their common law concern for precision had infused rigidity into the fluid and unwritten customary laws of the Hindus.

The study can be enlarged by a comparative study of the manner in which different foreign legal systems have been received into differing local communities. In concrete terms, one may perhaps acquire deep insights if one undertakes to study the reception of common law in an East African state. Nearer home, we have ready made pockets within the Indian Union, like the French Pondicherry and the Portugese Goa. It would, indeed be fascinating to compare these systems with the British-Indian system.

In the process of adaptation of common law to suit alien environment some institutions, like trial by jury, which were peculiar to the British social life had to be modified. To an extent this resulted in an improved version of the common law system in the receiving countries, and the fact of its adaptation to its new environment may be evidence of the vitality of the common law as a feature of the social life of the receiving society. It would be interesting to study as to what part of common law is thus capable of subsisting in an environment which is different from the one which created it.

The areas for comparative research will vary if we adopt the view that law is a means of social control, to which we alluded at the beginning of this chapter. We suggest that it would be both intellectually stimulating and practically useful to attempt to study the Indian legal system, as a going concern, directed to the satisfaction of a set of determinate economic, social and political needs. Comparative law has more practical utility than serving the mere purpose of "improvement of the general knowledge of law", or arousing "an international consciousness of law", or the "socialization of law".[4] Like the Greek mythological figure law gets its life by touching the earth. Keeping in mind the needs of our society and the situation of the world and the framework of law that we have chosen to adopt what areas can we select for comparative study?

The dilemma of selection both in the geographical sense and as regards subject-matter is rather acute. Geographically speaking, should we be content with examining only the legal systems closely related to our own. On

4. E. Lambert and J. H Wigmore, "An International Congress of Comparative Law in 1931", 24 *Ill. L. Rev.* 656 (1930).

this Rabel offers a suggestion. He urges the crossing of geographical barriers and says "the deeper we push the inquiry, the more bridges are revealed, and the more common conceptions and analogous, if not identical, solutions appear."[5] Though comparative study of the structures and institutions of distant legal systems may hold fascinating prospects, a country like India with all its limitations in resources and expertise cannot afford to have very ambitious projects, geographically speaking. We must necessarily limit our scope.

In addition to the above consideration, we must take into account another factor when we limit our areas of interest, *viz.*, the stage of economic development. It is only too obvious that we may stand to gain more if we compare our systems and institutions with countries of our own economic standard than comparing them with those of the affluent West. Of course, there are exceptions. Comparison of our democratic institutions, like the parliamentary system of government, freedom of speech, etc. with those of other Asian and African countries might lead to a very gloomy picture. May be, it will serve as a shot in our arm. But there are many other things where we can make useful comparison.

The areas selected for comparative analysis, in the present submission, must have relevance—immediate as well as long-range-to the needs of the society in which we live, and must correspond to the times. The developing countries are passing through the pangs of industrialization and trying to catch up with the phenomenal technological advances that the West has made. Law should serve as a handmaid to help in this transition. The interaction of law and development can itself make a fascinating study. A range of subjects attract our attention in this field. What have the developing countries to learn from the advanced industrial societies in the field of industrial laws, labour relations, and trade union movements, etc.? A comparative study of the laws of patent, monoplies, and cartels can yield useful results. A look into the legislation for the protection of industrial workers, by way of employment and injury insurance, and regulations ensuring the health and working conditions in industries and mines in different countries may help.

One of the most dramatic manifestations of the interaction between law and development lies in the field of economic cooperation between the rich and the poor nations. No rhetoric is needed to emphasize the fact that the newly independant nations of Africa and Asia need technical and economic aid to telescope the time-span which the advanced states took to reach the present stage of industrialization. It is equally true that the experience of both the aiding and the aided countries has not been entirely happy. Of course, it is for the economists and political scientists to investigate the causes and cures of this important phenomenon. But the lawyer can also help by analysing the legal factors involved. He can bring to light the defective rules regulating the free flow of foreign investment through a comparative analysis of similar laws in other developing countries which have benefitted from bilateral and multilateral economic cooperation. International economic cooperation in both its manifestation of trade and aid is thus susceptible to comparative scrutiny.

In this context we may mention a new study of international business relations that has been developed in the American law schools. This study

5. E. Rabel, "On Institutes for Comparative Law", 47 *Col. L. Rev.* 230 (1947).

ranges from transnational commercial contacts between companies to studies in taxation systems in different countries, with a view to inform prospective investors. One may also mention here the need to have studies in company law on a comparative basis, and the unificatory movements relating to commercial and other economic matters. Such a study is obviously interesting in the Indian context in view of our increasing commercial contacts with a series of countries of widely differing legal systems in Asia and Africa.

A comparative study on the national level of the ways and means employed by different countries in similar situations (or advanced countries in their early stages of economic and social conditions which were not very dis-similar to ours) to bridge the gap between the rich and the poor within the nations would be useful. The gap, naturally, generates disorder within the states. We come down in this process to the fertile fields of taxation and welfare legislation. What have we to learn in these matters from other countries? We may even turn our attention to the Scandinavian countries which seem to have attained perfection in these fields. A comparative analysis of the laws surrounding public utilities may yield beneficial results.

Another facet of the disparities which cause unrest within communities is in the field of agriculture. What can we learn from other similarly situated Asian or African countries in the sector of land reforms. Iran is reported to have made good headway in the field. How did law help there? A host of other factors related to agrarian unrest could be taken up for comparative study.

In this framework, the Judiciary could be fruitfully examined, it being the sentinel of social control. Though apparently we have adopted the British model, the transplantation may not have been successful. Needless to point out, we have adopted and relied upon the British models for uses to which they were never put in Britain itself. For instance, our Supreme Court, which resembles very much an English Court, construes the Constitution, while the highest court in Britain has no competence to do. The processes of recruitment to the judiciary, the salaries of the judges, the retirement age and the general conditions of service in the judiciary are not best calculated to secure a happy atmosphere in the judiciary. The reliance on the French model for seniority for the highest post in the judiciary has given rise to short tenures of office. One can hardly imagine in such circumstances the collection of stable teams of judges in the highest courts like the one associated in America with the Warren court. A serious comparative study can be made therefore of the system of judiciary as it obtains in England, France and United States to understand the true conditions in our own.

Other fields pertaining to judicial administration, within the framework of our enquiry, could be the method of trial in courts. The legal profession in England seems to be extremely concerned about the costs of trial. India has all the more reason to evaluate the expense of trial in its courts. Can we say, for instance, with any amount of conviction that whatever the costs of our trial procedure in courts justice is being ensured! If not, what can we learn from the trial procedures of other countries to improve the efficiency in the administration of justice as well as lessen the costs.

It is obvious that mere improvement in the numbers does not ensure efficiency of the judges. Two judges would not necessarily be twice as

efficient as one. Improvement in the administration of justice will have to be undertaken not in the quantitative but in the qualitative sense. Would it not ensure greater efficiency of the High Courts and the Supreme Court judges if the load of work is reduced to reasonable proportions?

On the level of the organisation of the legal profession an interesting study could be made on the institutions of Notary Public (French) and the Solicitor (English). The ancillary problem of legal aid could also be investigated on the basis of comparison.

A great deal could be done by a comparative method to find out as to what matters are appropriate to be dealt with by judicial process and what is the appropriate material to be submitted to a particular court for reaching a particular decision. Domestic disputes, for instance, could better be taken away from the criminal jurisdiction of courts. Would it not be proper to entrust disputes relating to family to tribunals unencumbered with the laborious trappings of a normal procedure?

A study of pre-trial activities in the process of criminal judicial administration-frisking, detention, arrest, remand, bail, interrogation, search, seizure-call for intensive comparative analysis. Does our system ensure a harmony of the two conflicting basic values operating in the above areas, *viz.*, the security of the social order and the liberty of the individual?

As respects administrative tribunals a good deal of research remains to be done on a comparative basis with the French *droit administratif*. Broadly, the problem of judicial control of administrative action opens up a splendid vista for enquiry and evaluation.

Simultaneously, or as the next stage of comparative legal research, the question of political stability in developing countries might be taken up. Obviously, the problem of development is closely related to political stability. There is a whole range of subjects connected with political stability, which warrant sophisticated treatment by academic lawyers. The institutions of democracy and parliamentary form of government and the nature of federalism will be covered under this rubric for comparative analysis.

A number of questions have been agitating the Indian minds relating primarily to political institutions. The lawyers can provide useful guidelines on some questions which have a legal basis, for instance, the powers of the governors, speakers of the House, and the problems of stability of political parties (defections) in the country. Some inoccuous provisions in the Indian Constitution have received new meanings and interpretations with the changing character and needs of the body politic. What has the Indian legal community to offer by way of comparative study? Would exegetical analysis based merely on textual criticism be enough?

Another problem of considerable importance for the peace and order in India is communal harmony. One of the most persistent *cliche's* in all post-mortem analyses of communal riots is that the minority community's personal laws create difficulties in the way of its complete assimilation in the mainstream of national life. It will be interesting to examine the personal laws of the Muslims on a comparative basis with the changes that have been brought about in this regard in other countries with substantial Muslim population. The inquiry might be extended to include a sociological survey of informed public opinion on the matter of a common civil code. It would be highly rewarding to investigate the interconnection, if

any, between the personal laws of the Muslims and the causes of communal riots.

This kind of study, more generally, leads us to the questions of unification of law, which has received a new lease of life through the concept of harmonization of laws. We can engage ourselves in a fruitful study of harmonization of laws on the regional level. The E.E.C. and many other closely-knit regional organizations in Europe and elsewhere may throw some light in this direction.

The areas carved out above might look sketchy, arbitrary, superficial and haphazard. The list had necessarily to be the way it was, for only a collegium of experts in different fields of law could have delimited precise areas for research—and even on such a list there would probably have been differences of opinion.