CHAPTER II

Better Lawyers and Laws Through Comparative Study

A substantial section of people concerned with legal education believe that comparative law is a mere "superficial adornment of more bread-and-butter matters",[1] a luxury which cannot be afforded in a three years' programme preparing the student for professional life. Comparative law has even been categorized as intellectually expendable. Another school of thought, in tune with those who insist on the need to turn out good lawyers instead of mere legal technicians, argue vehemently in favour of the comparative method. For the reasons which follow the views of the first school appear to be shortsighted and ill-conceived. Today no apology seems to be needed to stress the need for a comparative approach in legal education.

In addition to the cultural, aesthetic, sociological and philosophical aspects—which are obvious—there is a practical side to the learning of foreign law. What is this practical bearing of this subject? Do we have to learn and adopt the comparative method only because "there is an irresistible current in mankind towards knowledge"?[2] Does it have to serve merely as the vehicle for the legal, sociological and anthropological comprehension of foreign societies? Is it only the chief weapon in the armoury of the jurist? What more purposes, other than the aesthetic satisfaction of appreciation of the special genius of a legal system, does comparative law serve?

Practical Utility of the Study of Comparative Law

Gutteridge admitted before he wrote his little classic[3] that it is "impossible to test the value of comparative instruction except to a very limited extent; its potentialities are thus, in a large measure, a matter of speculation".[4] But things have changed since then. Comparative law has become one of the indispensable tools for a practicing attorney and the wise judge and the vigilant legislator.

As respects practicing attorneys the practical utility of comparative law manifested at least in four different ways, said Stevenson.[5] Indianizing

1. Hurst, *The Growth of American Law : The Law Makers*, 258 (1950).
2. Lepaulle, "The Function of Comparative Law", 35 *Harv. L. Rev.* 855 (1922).
3. H.C. Gutteridge, *Comparative Law* (1946).
4. H.C. Gutteridge, "Comparative Law as a Factor in English Legal Education", 23 *J. Comp. Leg. & Int'l L.* 132 (1944).
5. J.H. Stevenson, "Comparative and Foreign Law in American Law Schools", 50 *Col. L. Rev.* 616 (1950). The situations foreseen by Stevenson have been adopted to suit Indian conditions.

Stevenson's illustrations, the most obvious situation, of course, is in an international conflict of laws case in which it has been determined that foreign law is applicable. Effective examination and cross-examination of expert witnesses presumes at least a minimum acquaintance with the laws and techniques of the foreign country in question. Secondly, a lawyer might be retained by a foreign client who also employed counsel in his own country. In this situation an attempt to communicate with the foreign lawyer would require some knowledge of his legal terminology and concepts as a vital safeguard against misunderstanding. Thirdly, there is the converse situation of an Indian lawyer with local clients who are engaged in international trade or finance where foreign counsel will be retained to handle most legal problems arising abroad. Here it will be necessary for the Indian lawyer to know enough foreign law to discuss the problems intelligently with foreign counsel and to give him appropriate instruction. Finally, in cases of first impression where a similar issue has been decided abroad, reference to foreign law may be helpful to the lawyer in winning his case.

The courts on the other hand are inclined to rely on foreign law in two situations. First, when the question before them is a novel one that has, however, been decided abroad. Second, when the judges wish to depart from a well established local rule and find that the new rule they wish to lay down has been adopted abroad. Obviously, the judges cannot be expected to be familiar with foreign law. It is therefore upto the lawyer to call it to their attention. Viewed in this angle comparative law, becomes a tool of the practing attorney to whom it may provide with insights, ideas and arguments, which he is unlikely to obtain merely by looking at the structure of his own law from within.

A tool in the Hands of Legislators

As regards its practical utility to the legislator it can hardly be exaggerated. This will be brought home by reference to Lord Gardiner's revealing anectode in his address to the American Bar Association in 1966.[6] Referring to an Act passed by the British parliament Lord Gardiner pointed out that dissatisfaction was expressed at the working of the Act, primarily because the tribunals established under the Act were inquisitional and not accusational. So the Government set up a small royal commission to inquire into its working. The commission had nearly completed its work, Lord Gardiner narrated, when it was discovered, accidentally, that India had followed Britain with a similar Act, had experienced the same difficulties, and that the Indian Law Commission had inquired into it subsequently and published a long report on it.

The narration of this story is followed in Lord Gardiner's address by the information that the ministers of justice of eighteen European countries who met in Berlin were suggested steps for strengthening the existing framework of international cooperation in the legal field so that in each country the agencies of law reform may be kept abreast of what was happening in other countries, and perhaps even of that which was not yet happening but was in contemplation.[7]

6. Gardiner, "Comparative Law Reforms", 52 *A.B.A.J.* 1021 (1966).
7. *Ibid.*, 1025.

Law Reform Agencies and Comparative Law

Agencies and Institutions concerned with legal reform and research thus have great responsibilities. They can present to the legislatures the experience of other legal systems in dealing with comparative problems, and cultivate in prospective legislators a more receptive attitude towards legislative aids of this nature. Particular care must be taken by such institutions to avoid edifying vain theories, and concentrate on assembling facts about foreign legal developments for purposes of comparative legislation. The comparative law institutes would gain nothing by being dubbed as academies or centres of doctrinal speculation. The science of comparative law, as stated by de Laboulaye, must be a positive science like physics and chemistry.[8] The object of the legislator must be to verify a hypothesis by successive observations of the same phenomen from different angles. Lepaulle called this process "recoupment".[9] As Lepaulle explained further :

> When one is immersed in his own law, in his own country, unable to see things from without, he has a psychological unavoidable tendency to consider as natural, necessary, as given by God, things which we simply owe to historical accident or temporary social situation...to see things in their true light we must see them from a certain distance as strangers, which is impossible when we are stydying phenomenon of our own country. That is why comparative law should be one of the necessary elements in the training of all those who are to shape society.[10]

It is hardly necessary to add that one is thus able to analyse one's own system better. In fact any hypothesis or theory is the better if held up to the light of comparison.

Also, comparative material before the legislator will provide him with the warning as to what to avoid. And it is in this endless process of legislative reform that comparative law is truly "in action."[11] The most valuable function therefore that such academies could perform, is furnishing rapidly information respecting given points of foreign legislation, placing at the disposal of specialists and more particularly of experts, to wit, the legal practitioners, an exact documentation. The leading academies performing such function before World War I have been : the Society of Comparative Legislation of Paris, founded in 1869; the Society of Comparative Legislation of London, which dates from 1894; and the Belgian Institute of Comparative Law, founded in 1907. Between the two wars, however, the academies multiplied in France, Germany, Italy, the United States, and in some Latin American countries.[12] We refrain from making any guess as to how long it will take to establish such an institute in India.

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8. Cited in G. Escarra, "The Aims of Comparative Law," 7 *Temp. L. Q.* 300 (1933).
9. Lepaulle, "The Functions of Comparative Law", 35 *Harv. L. Rev.* 853 (1922).
10. *Ibid.*. 858.
11. C. J. Morrow, "Comparative Law in Action," 3 *J. Legal Educ.* 404 (1951).
12. See M. Ancel, "International Committee of Comparative Law-Inquiry on the Organization and Purposes of Institutes of Comparative Law", 4 *Am. J. Comp. L.* 248-68 (1955). For a list of institutes dealing with comparative law, see Rene David and J.E.C. Brierly, *Major Legal Systems in the World Today* 506 (1968).

Comparative Law for the Students

As regards the practical utility of comparative law to the student, and the needs to include the subject in the law school curricula, Dean Rossce Pound writing in his inimitable way, in the *American Journal of Comparative Law* in 1952, had this to say: "as a member of a profession practicing a learned art, the lawyer should have not only a general culture but culture in his own vocation which today calls for a learning beyond the system he is to practise."[13] The legal culture which Dean Pound had in mind consisted of a background of comparative law that would enable the lawyers to appreciate the technique of developing and applying legal precepts which will give meaning to the provisions of the codes and doctrinal discussions they will have to study. The non-practicing theoretician, on the other hand, should have a thorough grounding in the law he teaches based on a sound understanding of the system, the technique, and the historical development of each of the two great systems of law which divide the civilized world, *viz.*, the Common Law and the Civil Law.

The idea behind this conception of producing well-rounded lawyers has been ably explained by another leading authority in the field, Hessel E. Yntema. So long as there was crime, poverty, or injustice, or the scourge of war hanged like the Sword of Damocles over mankind, stated Yntema, it could not be assumed that technical proficiency and material progress alone will resolve human needs. In this situation, the argument ran, law occupied a strategic place as the chief instrument by which peace and welfare of mankind was systematically secured.[14] The study of law therefore, according to Yntema, "must be more than indoctrination in technique; its distinctive object is legal science and research as the rational means to maintain and improve the legal order which is the primary condition of modern civilization and of all that we hold most dear".[15] And as Dean Pound so succintly put: "An adequate foundation for legal reasoning is not laid down when only the principles of one system of law are taught."[16] Rheinstein went a step further to suggest that "comparative law, meaning the "sociology of law", ought to be part of the general study not only of sociologists and political scientists, but of every 'educated man' desirous of understanding our civilization."[17]

The purpose of legal education is thus not merely the production of legal technicians but also the creation of a psychology in which the lawyers serve as instruments for securing peace and welfare in the communities in which they live. Admittedly we are pitching the aim too high. But that is the ideal one must strive to achieve. This makes it incumbent upon us to chart out the programme very carefully. How should one go about educating the lawyer in the true spirit of law?

It has been said that education is what remains after the facts have been forgotten. It is therefore unwise to cram the head of the student with details about the position of, say, French torts, German social legislation, or

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13. See Roscoe Pound "Introduction" 1 *Am. J. Comp. L.* 1 (1952).
14. H. E. Yntema, "Comparative Legal Research: Some Remarks on Looking out of the Cave," 54 *Mich. L. Rev.* 928 (1956).
15. *Ibid.*, 928.
16. R. Pound, "The Place of Comparative Law in the American Law School Curriculum", 8 *Tulane L. Rev.* 161, 165 (1934).
17. M. Rheinstein, "Teaching Comparative Law", *5 U. of Ch. L. Rev.* 622 (1938).

Swiss conflicts of law. We would be justifying Lord Bower's jibe if we do so, *i.e.*, "a jurist is a man who knows a little about the law of every country except his own."[18] To borrow Judge Hackworth's recipe prescribed in the context of international law: "About the most you can do is to give [the student] the fundamentals and tell him how he can find out more about the particular subject."[19] The whole aim is to give a stimulus to the student's mind in order to increase his ability of conceptual thinking, imagination and legal resourcefulness.

What then should be the quantum of learning that should be imparted to the student. The quantum, of course will have to be varied in accordance with the capacity and the needs of the student. Gutteridge, envisaged different considerations applying to (*a*) under-graduate instruction, (*b*) post-graduate study, and (*c*) research.[20]

Comparative Law at Undergraduate Level

So far as the role of law schools in the first category is concerned the aim must be to broaden the horizons of students and to inspire those of over-average talent by awakening their interest in history, comparative law and philosophy. The aim must be merely to place domestic institutions on a broader background, illuminating them by selected comparisons with their foreign counterparts with exact information and broad perspectives. For this purpose text books and lectures alone would not be sufficient. They should be supplemented by other materials. The purpose of such materials, of course, should be not to explain foreign law through comparison, but rather to illustrate its operation.[21]

In view of the aim at the undergraduate level of rousing the interest of the keen and the intelligent towards the comparative method, the courses offered in this method should be in a condensed form. This could best be done mainly through lectures by teachers and the student should be referred for additional information first to textbooks and only subordinately to collections of foreign materials. The question then arises as to how selection of foreign law materials should be made to be presented to the student in a "teachable" form.

Since excessive specialization should be carefully avoided at the undergraduate level both in view of the limited time available for this "cultural" subject and in view of the heavy load of "bread-and-butter" courses. the foreign law material should be impressionistic rather than exhaustive. The practice hitherto has been to teach Civil Law courses for students in the Common Law countries and *vice versa*.[22] Sometimes textbook writers have adopted the better approach of embodying synoptic summaries of the salient features of the major legal systems of the world.[23] The present author has, however, digressed from this practice without in any way meaning to belittle the importance of the above methods. In the present submission since the Asian countries have inherited and evolved a blend of local law and the

18. See F.C. Auld, "Comparative Law", 26 *Can. B. Rev.* 360 (1948).
19. Cited in Jaro Mayda, *op. cit.*, n. 39.
20. H.C. Gutteridge, "Teaching of International and Comparative Law", 23 *J. Comp. Leg. and Int'l L.* 131 (1941).
21. Sereni, "On Teaching Comparative Law", 64 *Harv. L. Rev.* 776 (1951).
22. See Arthur von Mehren, *The Civil Law System* (1957).
23. David and Brierley, *op. cit.*

foreign law of their erstwhile colonial masters, it was felt that the legal systems of each individual country in this part of the world would yield interesting insights. But then such a synoptic view had to be necessarily selective to be manageable in a textbook. Therefore the neighbours of India have been chosen for such a treatment in this monograph.

The selection of the foreign law material, as rightly pointed out by Gutteridge, must be done with a view to avoid the bugbear of linguistic difficulties. The objective at this level is only to make the undergraduate "conscious that there is more than one way of doing things", and to assist him to obtain "the necessary relative criteria from which to reason and exercise his imagination."[24] Also, as another authority stated, it is good for even the youngest student to realize that the rules of his own law are not universally valid dictates of reason applicable *semper ubique et ab omnibus*, and that other legal systems may have different rules from those prevailing in his own country. This way even the youngest studeut will benefit from a comparative comprehension of law.[25]

This raises the further question as to whether, for the student whose main effort must be directed to mastering his own system and who has no liesure for the profound study of other systems, such a comparative comprehension may be best obtained by the superficial study of other system or by the introduction of illustrative comparisons at appropriate points in the teaching of his own system. If he is to make a superficial study of one or more foreign systems there is still the further question whether that system should be Roman Law or some system of modern law. For reasons stated earlier-*viz.* promotion of international understanding, production of well-rounded lawyers and for a better view of one's own legal system, we have selected the method of reproducing synoptical summaries of the legal systems of neighbouring countries.

Comparative Law at the Post-Graduate Level

In the nature of things a master's degree student will benefit a good deal by the process of comparison. It is uncommon, for instance, that a student of constitutional law is instructed only in Indian Constitution. Generally, there are other papers also at the LL.M. level on the British, American, Canadian, Australian, the Soviet, etc., constitutions obviously intended to broaden the horizons of the student. The teachers, of course, would do well to teach these constitutions comparatively rather than separately in separate classes.

Also, it would be a good idea if the LL.M. student of constitutional law, for instance, is asked to write a dissertation on a small topic. An intensive study of, say, religious freedom, due process, or any vital subject, for that matter, of some relevance to India, will be very useful. The dissertation could be scrutinised and evaluated not for any originality but for its comprehension of the problem.

Training Teachers and Researchers

Keeping in mind the seriousness of purpose, the selection of students in the comparative law programme therefore must be made very carefully.

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24. H.C. Gutteridge, "The Teaching of International and Comparative Law", 23 *J. of Comp. Legislation & Int'l. L.* 61 (1941).
25. A.H. Campbell, "Comparison of Educational Methods and Institutions", 4 *J. Legal Educ.* 39 (1951).

There is no gainsaying the fact that the student in order to be able to compare other legal systems must be fully conversant and have a mastery of his own legal system. The qualifications for teachers, for obvious reasons, must be even more exacting. "The exacting requisites for personnel might be in the nature of 'linguistic skill, learning, care and thoroughness, sensitivity, jugdment, analytical gifts, clarity of conception, and capacity for expressing alien thoughts in familiar terms."[26]

But since no one can be expected to unite all these requirements to perfection, organized teamwork seems to be the only practical means for quick and significant progress in the field. Team work becomes more necessary for an additional weighty reason that no one can be expected to be aware of even the salient features of all the major legal systems of the world. Moreover, unless one keeps track of the developments in the legal system of a particular country or region one's knowledge is likely to be outdated. Very few institutes can afford to assign experts in particular legal systems to follow attentively the evolution of national laws of that system. Mutual cooperation and help therefore becomes very essential—without, of course, envious competition.

The responsibility of the law schools in the training of teachers and promotion of such cooperation can hardly be emphasized. The American law schools have taken the lead in training teachers in, for instance, the Civil Law system (*e.g.* Harvard's Arthur von Mehren) and the Soviet legal system (*e.g.* Columbia's John Hazard).[27] It is, of course, too much to expect every Indian law school to send bright young teachers abroad for training in foreign systems. Also, since we do not intend to suggest expertise in a particular legal system as such but suggest specialization in the methodology of comparative law, some leading law schools and particularly institutes dedicated to research in law will do well to send selected members of staff to take a year's course at some advanced centre of comparative law abroad. The law school deans should therefore cease to look upon comparative law as some scholarly embellishment in the catalogue of those who are rich enough to afford it.[28]

Cooperative Effort in Research

Cooperation in the field of research in comparative law becomes all the more acute. The task of collecting documentation on all the major legal systems of the world is so staggering that it is unimaginable as to which law school or research institute in India could afford to have it singly. Even the American and British law schools have not been able to afford such gigantic collection as the Harvard Law School. A careful reading, sifting, listing and digesting of the materials available in Indian law schools is therefore necessary. A master catalogue of foreign legal materials available in Indian Universities and in the libraries of the law departments of the government both at the centre as well as the states might be a first useful step. Another useful measure might be to coordinate the comparative law programmes in such a way that individual law schools specialize in the

26. E. Rabel, "Institutes for Comparative Law", 47 *Col. L. Rev.* 231 (1947).
27. See R.H. Graverson, "The Teaching of Comparative Law in U.S.A.", 32 *J. Comp. Leg. & Int'l L.* (3rd Ser.) 31-6 (1950).
28. See J.N. Hazard. "Comparative Law in Legal Education", 18 *U. of Ch. L. Rev.* 265 (1951).

literature of a particular area or subject, and to institute procedures for the interchange of foreign materials.[29]

One more related issue of considerable significance concerns with the learning of a foreign language. It can be said with some surety that ignorance of a foreign language at the undergraduate courses in comparative law is not a serious impediment. But at the graduate level, and in the pursuit of serious research, language of a foreign legal system assumes great importance. One way of circumventing this difficulty is collaboration with experts in the foreign legal systems concerned. If, say, an Indian comparatist wishes to compare the position in India with that of the Soviet Union or Ceylon in a particular field of law, one way is to learn the languages concerned and study the respective rules in original; and the other way is to engage a comparatist or a simple specialist in the legal system of those countries in a collaborative endeavour. Considerations of time and resources suggest the latter course, though aesthetic reasons might impel one to the more onerous former course.

29. See H, Stevenson, "Comparative and Foreign Law in American Law Schools", 50 *Col. L. Rev.* 622 (1950).