CHAPTER III

Comparative Law and International Understanding

It is indeed paradoxical that while man is equipping himself at a fantastic pace to probe the mysteries of the stellar universe he is doing precious little to understand fellow human beings across his own state boundaries. Ignorance about the culture, history and institutions of states other than one's own is colossal. "Interdependence" and the "shrinking world" have assumed the odium of worn-out cliches. One hesitates to cite statistical data or statements of eminent authorities to prove that cooperation is the only way to avert disaster on this glorious, but, unfortunate, planet.

Transcendental Values

The hard realities of nationalist ardour fly in the face of any utopian dreamer. Yet, brave efforts are made daily by perceptive scholars to bend law in the service of humanity. One way of doing this, of course, is by inculcating a sense of submission to that brooding omnipresence in the sky, namely, international law. Though it will be unwise to pronounce the verdict of death on this science, in the circumstances in which the world seems to tilt precariously on the new-found scale of balance of terror, it will be equally unwise to deny the relevance of international law in the conduct of international relations.[1] The other method is through the evolution of a unified law with universal application by unearthing those "general principles of law recognised by civilized nations" envisaged in the Statute of the International Court of Justice. Comparative law has a great deal to do with the latter method. Writing in 1952, McDougal expressed the idea thus :

> In a world shrinking at an ever-accelerating rate because of a relentlessly expanding, uniformity-imposing technology, both opportunity and need for the comparative study of law are unprecedented. In this contemporary world, people are increasingly demanding common values that transcend the boundaries of nation-states; they are increasingly interdependent in fact, irrespective of nation-state boundaries, for controlling the conditions which affect the securing of their natives; and they are becoming ever more realistic in their consciousness of such interdependence, and hence widening their identifications to include in their demands more and more of their fellowmen. These changing perspectives of people the world over stimulate in turn ever-intensifying demands for wider and wider political cooperation, for

---

1. For a masterly exposition of the relevance of international law in the conduct of American foreign policy, see Louis Henkin, *How Nations Behave, Law and Foreign Policy* (1968).

more and more effective use of conjoined community power, for securing newly clarified and established goals.[2]

Whether or not one believes in McDougal's assessment of human aspirations for values transcending boundaries of nation-states (with all the different, baffling, and dangerous notions about human values that states with varying socio-economic and political systems have) none can question his statement that "both opportunity and need for the comparative study of law are unprecedented today."

International Commercial Contacts

The increasing contacts of individuals, corporations and groups of people across international borders has given rise to new situations. International trade and commerce has added another dimension to the profound changes that have taken place in the modern world community. Legal isolationism, just as political isolationism, is not possible today. No nation, howsoever strong, can turn its back upon the law and institutions of other nations. Living in splenderous isolation is simply inimical to present-day facts of international life.

Yet, each nation frames its own law as if it were the only nation in the world. Whether it is regulating the law of bills and notes, or the highly sensitive immigration rules, national fiat tends to have international repercussions. A foreign tourist committing suicide in a hotel in Kashmir, or an Indian businessman intending to invest in an African country, or a diplomat involved in a drunken brawl in a place of ill-repute, will set at motion a number of legal issues of different legal systems. The examples can be multiplied. Suffice it to say that nations as well as legal systems can no more afford to operate without coming into contact. The interaction sometimes creates friction, which may occasionally have repercussions on world peace.

It will be pretentious to claim parity for conflicting legal rules with philosophical, ideological, political and economic factors, as contributory causes for world tensions. Nevertheless one can maintain that they do contribute to misunderstandings. As Lepaulle stated in 1922, "divergences in laws cause other divergences that generate unconsciously, bit by bit, these misunderstandings and conflicts among nations which end with blood and desolation."[3]

UNESCO and Comparative Law

The above thought was aptly echoed in Paris after the devastating World War II.[4] In a preparatory committee called by the UNESCO, law professors from nine nations explored possibilities of furthering international understanding and peace through the study of law. The Committee declared: "We are of the opinion that the legal profession throughout the world owes a duty to the people from which it springs to unite in an effort to overcome such of the tensions and misunderstandings rending the world community as lie within its special sphere of competence."[5]

---

2. Myres S. McDougal, "The Comparative Study of Law for Policy Purposes", 1 *Am. J. Comp. L.* 25 (1952).
3. Lepaulle, "The Function of Comparative Law", 35 *Har. L. Rev.* 857 (1922).
4. See John N. Hazard, "A World Organization for Comparative Law", 2 *J. Legal Educ.* 80-6 (1949).
5. *Ibid.*, 81.

In a discussion preceding this declaration it was pointed out that misunderstandings had arisen in the past in the interpretation of treaty language, which had different meanings in the municipal laws of the contracting parties. Jullio Ascarelli of the University of Bologna explained that in his long experience in the Western hemisphere while an emigre from Mussolini's regime, he had occasion to find many points of misunderstanding between North and South America over different concepts of law.[6]

The Committee urged serious study of the legal systems of the world "not conceived as a panacea for all problems but as a scholarly study for a narrow but important field."[7] Noting with regret the lack of education in the laws of other countries, the Committee recommended that all professors of national law broaden their horizons to include comprehension of some foreign system of law as it relates to the field in which they were primarily concerned. It was urged, further, that all graduates of law faculties, not only those planning careers where knowledge of foreign law is essential, should be conscious of the diversity of conceptions in judicial systems current in the world today.[8]

The General Conference of UNESCO picked up the thread at its meeting in Montevedeo in the autumn of 1954. It adopted a resolution declaring its faith in the possibility of resolving all tensions by peaceful means through the exercise of restraint, tolerance, understanding and goodwill. It recommended that all member states encourage respect for justice, for the rule of law, and for human rights and fundamental freedoms which are affirmed in the United Nations Charter and the UNESCO constitution, for the peoples of the world, without distinction of race, sex, language, and religion and that they direct their attention to gaining recognition for the ideas of living peacefully together, of understanding and cooperation among all nations, whatever their differences, while recognizing the principle of self-determination. The General Conference, in pursuance of this aim, directed the Secretary-General of UNESCO to "undertake an objective study of the means of promoting peaceful cooperation in accordance with the aims of UNESCO."

As a result of the above resolution the Secretary-General convened a conference of law professors from 34 countries in 1955 and posed the challenging question: "can law professors through their research, contribute to an easing of tension throughout the world?"[9] Several national committees proposed varying schemes and research projects in answer to the question posed. Without going into details one might mention the American and Soviet thinking on the subject. The American delegation proposed research on problems such as: (1) problems of claimed sovereign immunity arising from East-West trade through government-controlled trading organizations; (2) differences in legal systems and procedures that have given rise to misunderstanding and mutual distrust; (3) arbitration of international trade disputes; (4) selected problems in the field of family law and succession; (5) the impact of state trading upon commercial treaties; (6) protection of

6. *Ibid.*, 82.
7. *Ibid.*, 82-83.
8. *Ibid.*, 83.
9. For an excellent report of the conference of lawyers see, John N. Hazard. "International Tensions and Legal Research", *J. Legal Educ.* 29-38 (1956).

industrial property in the trade between East and West; and (7) assistance to civil litigants across state boundaries, etc.

The Soviet Union and some East European countries favoured research on sensitive politico-legal topics as a way of easing international tensions. The suggested subjects included the principle of non-intervention; the principle of sovereignty, etc.[10] The reverberations of these early attitudes are being felt in the United Nations organs even to this day. Perhaps it would have been wise to accept the challenge of the Communist bloc countries at that stage if only to ascertain their later contradictions in the Hungarian (1956) and Czechoslovak (1968) crises. But that is only an incidental observation.

Contribution of Scholars

The main theme relevant for the present purpose, however, is that lawyers for quite sometime were recognized to have a role to play in the reduction of international tensions. It was not only the UNESCO that was seized of this problem. Scholars of high eminence had devoted considerable thought on the subject from time to time. In a thought-provoking article Barna Horvarth affirmed :

> If comparative law scholars combine their efforts, this might stimulate that competitive spirit among nations which is the real answer to the problem [protection of human rights]. For the problem is not primarily organizational. It is a matter of capturing the imagination, or illumination rather than coalescence. of thought-process and habits, at times tough and at times half-conscious, of inarticulate major premises that must be harmonized. It is by listening to each other and to the quiet operation of ideas and concepts underlying legal institutions, that nations are educated. In this process of self-education, comparative law can serve to evoke the spirit of enquiry and progress which is so indispensable to spontaneous, creative advance in the protection of the rights of man.[11]

A little earlier Horvarth maintained :

> Comparative law, conveying the message of each national legal genius, may shape *ius gentium* and thus cross-fertilize the various spontaneous national growths. By activating every where the catalytic agent of our legal civilization, by piercing the twilight of infinite detail in which the idea of the rights of man is groping for institutional and remedial realization, it may perform a real service for mankind within the strictly scientific ambit of relevant discriptive comparison.[12]

The inter-relationship between legal education through comparative method and world peace has been asserted more vehemently by Marc Ancel :

> In the troubles of an age in which peace still seems ill-assured it [Comparative Law] has become one of the hopes of humanity.[13]

---

10. See Hazard, *op. cit.*
11. Barna Horvarth, "Due Process of Law and *Exces de Pouvoir*", 4 *Am. J. Comp. L.* 573 (1955).
12. *Ibid.*, 572-73.
13. See R.H. Graveson, "Philosophy and Function in Comparative Law", 7 *Int'l. & Comp. L. Q.* 658 (1958).

The none-too-tenuous link between similarity of legal systems and world peace comes out in bold relief from the fact that with the exception of the birth pangs of the United States of America, and the consequent dispute of the early nineteenth century, and with the exception of the wars between India and Pakistan, in the course of this long history there has never been war between countries endowed with common law. In contradistinction to this one might look at the traditional hostility of France, Belgium and Germany—the inheritors of the Roman Law. It is interesting to speculate whether it was purely a coincidence or if there is a real reason hidden somewhere. Is it because the similarity of legal systems and institutions brings about similarity of approaches to world problems. Does this common outlook guarantee world peace? What, indeed, is the hidden reason for the absence of wars between countries endowed with common law systems? R.H. Graveson, suggested that the secret lies in the tolerance of opinion that the common law generates, and in the art it teaches of "disagreeing without becoming disagreeable."[14] Can it therefore be conclusively affirmed that dissimilarities in legal systems generate hostility and tension? How does comparative law help in minimizing the possibilities of friction?

Jaro Mayda made the interesting point that in the context of building bridges of understanding between nations comparative law provides the "key to the psychology and technique of foreign negotiators *than* some insight into the legal system by which their minds have been forged and in which they are anchored."[15] He asserted that some of the sterility of the "good neighbour" policy of the US was due to the lack of understanding of the Latin American mentality, the characteristics of which were so obviously reflected in their laws. Another example, according to Mayda, was Europe's Schuman Plan. The ultimate reason, stated Mayda, for British abstention from the Schuman Plan (which became, meanwhile, the European Coal and Steel Community) was probably the conclusion that Britain could not fully attend to its commonwealth interests and at the same time get highly entalgned on the continent. But there was enough evidence to support the contention that at the decisive moment the British were also doubtful about the whole blueprint on its own merits, largely because of the French "deductive approach." A better understanding of the pragmatic British mind, to which English Common Law was one of the better keys, might conceivably have helped to save the situation, concluded Mayda.[16]

One way, therefore, of preventing the differences in different legal systems from assuming inflammatory character, is through the promotion of better understanding of legal systems other than one's own. Comparative law serves as the key to such study. It offers to open up the legal mind of nations with varying legal systems. Obviously, if a negotiator knows the legal philosophy and background of another there would be less scope for misunderstandings. The other, and more positive way, to reduce the chances of friction, is to evolve, and hold them up to the nations, what has come to be called the common core of legal principles, and establish that the so-called differences are only skin-deep. This ambitious but vital method is discussed separately in the next chapter. We would only record here that one need not be led away by these differences of legal systems. There are, of course, vital differences of method, technique,

14. *Ibid*, 654.
15. Jaro Mayda, "The Value of Studying Foreign Law", *Wis. L. Rev.* 635,643 (1953).
16. *Ibid.*, 643.

practice and substantive rules. But the idiosyncracies of particular systems, as rightly pointed out by M. Handler, "have been over-emphasized and their importance grossly exaggerated."[17] Continental law, maintained Handler, was not so different, on the contrary, in continental law, the common law practitioner and scholar would find the solution of some of his most vexing problems and a fruitful field of research. He stated further :

> We have at our disposal the accumulated wisdom, the intellectual heritage of other races, the experience of other peoples in dealing with problems which despite differences in setting are essentially no different from our own.[18]

Having thus pieced together the theory that knowledge of foreign law is essential for the promotion of better understanding amongst people of different nations, and that ignorance in this field is likely to lead to international tension, we might close this chapter with the further remark that lawyers thus have an important function to perform in bringing out the areas of conflict and harmony between different legal systems.

17. M. Handler, "An Experiment in the Study of Comparative Law" 17 *Am. Bar Assoc. J.* 336 (1931).
18. *Ibid.*,336