COMPARATIVE LAW

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There is no country, perhaps, in which the study of comparative law is of more direct and practical importance than in Canada. Here the practising lawyer in, let us say, Ontario may any day be asked to advise upon a problem involving questions of law in Quebec.

It is not too much to say that the average Ontario lawyer is almost completely ignorant of the civil law as it is practised and applied in Quebec. I recently met a well-known practitioner in Toronto who was quite unaware of the fact that business transactions are fairly sharply divided in Quebec into "civil" and "commercial", and that this difference is fundamental for an understanding of the rights of contracting parties and the remedies available to them in the courts. The whole subject of family law and of succession, again, presents in Quebec an aspect that is basically unlike the common-law system.

It is not enough that the Ontario lawyer shall have a competent legal correspondent in Quebec who can advise him in such matters. He ought to have, it is suggested, such modicum of acquaintance with the codes and the jurisprudence of Quebec as will enable him to see these problems of Quebec law in their broad general outlines. If he has not that much at least, he will hardly know how to apply to his correspondent for help and counsel.

This is not all. The last few years have witnessed the arrival on our shores of many refugees from Europe — and they have brought their legal problems with them: and post-war conditions bring us, in foreign trade, many complex situations in which some basic knowledge of foreign-law principles is not only desirable but virtually imperative.

Where is such knowledge to be found? Can the law schools supply it?

There was a time when the study of Roman Law was included in the curriculum of most schools — but that day seems to have passed. True, the province of Quebec still requires a systematic course in Roman Law and the University of Toronto retains the subject as an essential requirement — but, generally speaking, and this is true of the United States as well as of Canada, such studies are discarded as purely academic.

Now, I am myself a teacher of Roman Law and I am much disposed in its favour as a method of elementary teaching and

juristic discipline; and yet I can understand and sympathize with those teachers who can find no place for it in an over-loaded curriculum. Its study demands a fair working knowledge of Latin — but most freshmen in our college courses have little Latin, and practically no Greek, nor have they that acquaintance with the background of ancient history that makes the subject of ancient law a vivid and informative pursuit.

Roman Law illuminates many obscure pages of our common-law record; and the time will never come, I think, when students, and lawyers, and judges, will no more turn to the *Corpus Juris Civilis* for light and learning. There is much, however, to be said for abandoning the meticulous consideration of the texts of Gaius and Justinian, and for substituting a brief historical survey of ancient law as a preliminary to the study of legal development on the continent of Europe and the establishment of modern civil law. The truth is that classical Roman Law has had far less to do with modern civil codes than most of us think. The law of Rome was only one of the sources out of which, let us say, the Code Napoléon or the Quebec Civil Code was built. It has been said that there is sometimes less difference between the approach of a common lawyer to a problem and that of a French jurist than between the approach of a French and a Spanish jurist. We must not, therefore, attach too much weight to the existence of Roman principles in modern law. Yet this much at least can be said. Civilians have found in Roman Law certain basic concepts and a basic terminology which make the communication of ideas, the meaning of language, reasonably easy, whereas the common lawyer, who is unacquainted with these basic modes of thought, finds himself in what appears to be an alien legal world.

Let us try to see what comparative law has to offer.

To begin with, we must surely admit that the methods of comparative legal history are still interesting and significant. It is not a truism to say that we shall learn much about the road on which we are travelling if we take a look behind us and about us, and see the obstacles that have already been reached, and overcome, and passed. The course of changes in contemporary law throughout the world cannot be adequately appreciated, nor can these changes be seen in their proper perspective, without some knowledge of the causes that have led to an alteration of rule, or, as the case may be, to the abolition of existing legal institutions or the creation of new ones.

The fields of constitutional and administrative law may not seem, at first sight, to afford very much room for comparative method. The common lawyer, indeed, can be excused if he says, "The governmental institutions of Soviet Russia, of Czechoslovakia, of a recently dismembered Germany, are beyond my ken. These matters can be left — or, at all events I shall leave them — to the political scientist." Yet I doubt if this is wise especially as regards the growth and development of administrative and quasi-judicial agencies. At all events, we ought to be prepared to admit that the study of governmental agencies as these function in Great Britain, in the United States, in Australia, New Zealand and South Africa, has proved of great value in the past in the elucidation of our Canadian problems.

Is criminal law a subject that adapts itself to comparison? On a superficial view it may not: and one can argue that social, religious, political and economic conditions vary so much from country to country that comparison cannot be expected to yield results of any great value. Let us stop to think, however. What of the new crimes that are not in our code? What of "xenocide"— the attempt to exterminate, ruthlessly and of set purpose, a whole race of people? What of the new offences for which criminals appeared at the bar of justice in Nuremberg? Surely these are matters of vital concern for us. Then, too, the contemplation of criminal justice in other countries may save us from falling into a sort of acquiescent complacency about defects in our own system of which we ought to be uneasily aware.

Labour law is a field in which the method of comparison has been consistently employed, with gratifying results that have suffered only a temporary set-back during the past few years. I do not need to remind readers of the work that has been done, and is being done, by the International Labour Office at Geneva and Montreal.

Family law and the law of property and succession exhibit wide divergencies as between one country and another. As I have said before, Quebec law is greatly different from our own in this regard. If comparative law did nothing more for us in Canada than show us what is capable of accomplishment in other countries, it would have done something worth while. The question of the laws of divorce is one in which we can learn much from looking outside our territorial and jurisdictional boundaries. The laws of succession, too, are susceptible of improvement in directions in which comparison points the way. The ownership and possession of property, moveable and immoveable, is encum-

bered in the common law by the weight of heavy tradition that comes down to us from feudal times. The student of modern civil codes may well look upon the common law in this regard as a museum of archaisms which is badly in need of housecleaning. Much has been done in England to reform the law of property. Why are we so reluctant in Canada to follow England's lead?

The law of obligations (contract, quasi-contract, tort, quasi-tort) is perhaps the richest field for comparative study and research. Sir Frederick Pollock observed some years ago that with the increase of international trade and of cases dependent on international transactions it was becoming more and more important to have some kind of accurate acquaintance with the principles of continental law. It would hardly be possible, he said, to draw a sharp line between the study of our own law and a moderate knowledge of continental systems, especially commercial law (which, we may note, is chiefly concerned with obligations). The days, he continued, were past when on a question of foreign law an English practitioner could be content to rely on the first expert he picked up. Law was becoming more and more cosmopolitan.

If we examine the question of the reform of contract law we shall see that the steps which are suggested lie in the direction of civil law rules. I refer in particular to such topics as the Statute af Frauds, the doctrine of consideration, and the rule in *Chandler* v. *Webster*. In the field of torts the absurdities of our old law as to contributory negligence were modified by the introduction of civil law principles: indeed in such matters as negligence, nuisance and defamation, the influence of continental jurisprudence, though not often expressly acknowledged, has been great. The speculations of European jurists on the "super-eminent equities", such as doctrines of abuse of rights and unjustified enrichment, have been studied by our own lawyers and judges, and the path of advance has been made clear even if we are rather reluctant to venture forward upon it.

Commerce is international. Business methods and business machinery attain a high degree of uniformity throughout the world. Business associations have standardized contracts and forms of conveyancing. If business men can agree on the content of a set of commercial documents, is it too much to hope that lawyers can agree on a basis of legal rules for their interpretation and enforcement? Something has been done in the past, and agencies are not now lacking to further the work of unification. The chief difficulty is that this work has hitherto been left largely

to experts and enthusiasts. What is necessary is that the legal profession as a whole should earnestly support the efforts of the few. To take an illustration: in 1930 there met at Geneva an International Conference for the Unification of Laws on Bills of Exchange, Promissory Notes and Cheques; and a uniform law was prepared. Such conferences ought to meet regularly, and it should be the task of the United Nations to provide a permanent secretariat and arrange for regular meetings and, eventually, to secure statutory authority for the uniform rules that are framed.

In no field of the law are differences more marked between our system and the continental system than in the field of procedure; and yet it is obvious that those who practise within common-law jurisdictions ought to know something about the way in which claims are enforced in foreign courts. Lawyers in Ontario should know the kind of evidence that may be adduced in a Quebec court, the remedies that are there available, the extent of liability for costs, and how judgments can be enforced; and if this is true so far as Quebec is concerned, it is true also where action must be brought in a foreign country. Then again, procedural reforms, if sought here at home, can be materially assisted by a study of the measures taken in other countries to solve problems of the same kind.

Conflict of laws presupposes, for its study, some knowledge of the principles and jurisdictions that are in conflict. Here, then, some exact knowledge of a foreign system may be required and it is not enough to say that the expert will supply it. A solicitor must be able to prepare a brief, and counsel must be able to submit an argument, in terms that reveal a competent knowledge of the matters in which conflict arises.

Legislation, above all, may be regarded as the field in which the comparative method can be applied to the greatest advantage. Many noteworthy reforms in this regard have been preceded by comparative study of analogous projects in other countries, notably in such matters as workmen's compensation, unemployment and health insurance.

It perhaps remains only to add that the functions which comparative law may be called upon to discharge in the sphere of international law and international relations are so obvious as to indicate an indispensable method of approach.

So much, then, for the contribution that the comparative method can bring to the systematic development of our law. We must next ask ourselves what are the sources open to lawyers for the study of comparative law.

A student in this field will be materially helped if he has a reasonably adequate knowledge of foreign languages, especially of French and German — but even if he has not such knowledge, this is not a bar to much really effective work on what we may term the "practical level": it is only in postgraduate study and research that the lack of such knowledge is a serious handicap.

Some general survey of the whole field of the civil law would appear to be prerequisite. It may sound absurd at this late date to recommend the reading of Maine's Ancient Law — but that tried old classic, especially as supplemented by Pollock's notes, may well serve as an introduction. It can be followed by Lee, Historical Jurisprudence, and by Wigmore, A Panorama of the World's Legal Systems. For more specific studies the reader may refer to the Continental Legal History Series, published by the Association of American Law Schools. An excellent Introduction to French Law is provided by Amos and Walton, while Schuster's Principles of German Law, though published a long time ago, gives an admirable survey of German civil law in the days before that system became vitiated by a spurious and evil nationalism.

In the realm of Quebec law there are few brief elementary texts, though Walton's Scope and Interpretation of the Quebec Civil Code may be consulted with profit. Annotated editions of the Civil Code and the Code of Civil Procedure are readily obtainable, though the common lawyer must remember that the provisions of the Code (*loi*), read without the help of commentaries (*doctrine*) and of decided cases (*jurisprudence*), may often lead him to hasty and incorrect conclusions. An excellent though unpretentious little volume, Carroll, Commercial Law of Quebec, may guide the common lawyer to a preliminary knowledge of much of the Quebec system. More ambitious works are the scholarly treatises of Mignault, of Trudel, and others.

Quite remarkable in its way is the *Journées du droit civil français* (1934), published at the instance of the Bar of Montreal and containing a collection of essays and papers prepared by eminent civilians, Canadian and foreign, for the *réunion* on the occasion of the Jacques Cartier celebrations. This demonstration of the comparative method applied to the civil law has no precise parallel in any common-law jurisdiction and it is a striking tribute to the high standard of the bar under whose aegis it saw the light.

The *jurisprudence* of the Quebec courts (and the same may be said of any civil-law courts) must be approached cautiously by the common lawyer. He ought not to need reminding that the theory of *stare decisis* is by no means a basic principle of the

civil-law system, though, on the other hand, he must not think that even a single decision, particularly if it come from one of the higher courts, is not of very cogent force. He will be on his guard, however, against the dangerous similarities between civil and common-law institutions (*cf.* mandate, agency) and will refrain, as a rule, from seeking to apply, as of authority, the decision of a civilian judge in a case arising before a common-law court.

The law libraries of Montreal and Quebec are quite well supplied with common-law texts as well as most of the really authoritive civil-law texts: but the reverse is not true of libraries in common-law jurisdictions, with the exception of Ottawa. The Osgoode Hall Library, excellent in other respects, leaves much to be desired in this regard. The library of the University of Toronto lacks many of the Quebec text-books and commentaries, though well supplied with Quebec reports; but it does contain a fair number of civilian commentaries and works of continental jurisprudence.

The systematic study of comparative law has been entrusted in largest measure to a number of societies and associations of which, for our purposes, the Society of Comparative Legislation is the most important. This society, founded in England in 1895, publishes a Journal and makes an annual survey of the legislation of the British Commonwealth and the United States. The English universities have closely cooperated with the Society and recently the University of Cambridge has commenced a series of studies in International and Comparative Law under the editorship of Dr. H. C. Gutteridge, Dr. H. Lauterpacht and Sir Arnold McNair. This series is described as being "designated to give scope for full treatment of Public International Law (also including, it is hoped, certain aspects of diplomacy and international relations in general); Private International Law, or the Conflict of Laws, which the increase of contracts involving different countries now makes a subject growing in importance and complexity; and Comparative Law, a method of study and research essential to the production of community of thought and interests between lawyers of different nations, and to the development and reform of the law."

Comparative Law, by Dr. Gutteridge (Cambridge University Press, 1946) is the first volume of this new series to appear; and to it I am very deeply indebted for the facts and essential principles upon which this essay is based. The purpose of his book, the author explains, is first of all to explain the origin

and meaning of the phrase "comparative law"; secondly, to describe the various purposes for which the comparative method may be used and the manner in which it functions; and finally, to estimate the value of comparative law as an instrument for the growth and development of the law. In all of this, Professor Gutteridge, as might be expected from so illustrious a scholar, has succeeded so admirably that he may be said to have supplied the plan and chart for the work that lies ahead in this field in common-law jurisdictions.

In the United States there are special problems of comparative law; and these have been the concern of the American Bar Association in its special section on Comparative and International Law. It should also be noted that governmental departments in the United States, such as the Department of Commerce, publish reviews of foreign legislation — while the Association of American Law Schools has published several series and monographs dealing with problems of comparative legal research.

On the continent of Europe the senior association is the *Société de Législation Comparée*, which, since its establishment in 1869, has published a *Bulletin* of outstanding value, to which is now added the *Annuaire de Législation Comparée*, which contains a brief annual summary of the statute law enacted throughout the civilized world. This society and other societies of the same sort throughout Europe have made noteworthy contributions to comparative legal research; and among these may be mentioned the *Zeitschrift für vergleichende Rechtswissenschaft* (replaced under the Nazi regime by the *Zeitschrift der Akademie für Deutsches Recht*), the *Rivista di diritto internazionale comparato*, and the *Rassegna di diritto commerciale e straniere*. A newcomer in the field is the International Academy of Comparative Law at The Hague, which has published two volumes of its *Acta Academiae Universalis Jurisprudentiae Comparativae*.

Materials for study, it will be seen, are really not lacking. What is lacking is the will and endeavour on the part of the legal profession in this country to do something practical in the way of comparative legal studies. It is suggested that the first step must be taken by systematic education at the undergraduate level.

It will be objected that the law schools, with curricula already overloaded, cannot take on a new subject. But comparative methods may be studied without being raised to the level of a special subject. Jurisprudence, or the general theory of law, where this is taught, can be taught comparatively as well

as analytically. Legal history, if it is to be studied at all, must be studied against the background of a general political development on the continent of Europe and in the Americas as well as in England. Special aspects of contract and quasi-contract can most usefully be explained by methods of comparison — and knowledge of Aquilian delict and of civil-law concepts of fault and liability throw much light on our problems in the field of torts. If I may speak for one university, we shall in Toronto continue to teach to undergraduates the principles of Roman and civil law as an introduction to the modern codes. In Quebec the comparative method is *de rigueur* so far as concerns the systematic study of civil law; and, in that province, undergraduates are early instructed in the principles of the common law as a basis for comparison.

In post-graduate studies the universities in Canada are eager to seize the opportunity for comparative legal research. At Toronto University, candidates for the degree of Bachelor of Laws are examined in the Roman Law of Obligations and in Comparative Common and Civil Law, while candidates for higher degrees, such as the doctorate, may elect to pursue special studies in civil law and to submit theses on problems of comparative research.

We are all of us familiar with Lord Bowen's jibe that "a jurist is a man who knows a little about the law of every country except his own". This is, I think, a little unfair and not a little untrue. Certain it is that judges like Mansfield, Macnaghten, Haldane, Dunedin, Macmillan, were none the worse, and much the better, for the civilian learning that they added to their common-law attainments: and it might be invidious if I were to point out that our greatest judges in the Supreme Court of Canada have been masters of two systems. Practitioners, too, who can achieve a working knowledge of the laws of all provinces, and some knowledge of American and continental jurisprudence, will be all the better equipped, in these days when distance means so little and the affairs of men are so wide, to deal with the multifarious and complex problems that clients bring before them.

It is suggested that the Canadian Bar Association can materially help to advance the study of comparative law in Canada:—

1. The Section on Comparative Law can select interesting topics for panel discussion at conventions and meetings of the Association, arranging, if possible, for the attendance and advice of visiting foreign jurists.

2. The Section on Legal Training can make representations to the governing bodies of law schools as to the desirability of including, in the systematic teaching of common-law subjects, some comparative review where this review is likely to prove of real utility.

3. Editors and publishers of legal periodicals and texts should be encouraged to make available to readers the most recent points of research by civilian jurists both in Quebec and in foreign jurisdictions. Texts in foreign languages can be noted in brief reviews and summaries in England.

4. Members of the Association will serve their own interests well by remembering that law can no longer be regarded as a body of narrowly national institutions. If Cicero's dream of "one eternal and unchangeable law . . . valid for all nations and at all times" is an unrealizable ideal, nevertheless we can hope for and work towards a new *jus gentium* which shall reconcile the greater part of our local differences in the interests of international harmony under the rule of law.