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THE LAW OF CONFLICTS AND COMPARATIVE LAW: SOME SIMILARITIES AND LIMITATIONS*

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A legal system can become involved with the values and understandings of another legal system in two different ways: by developing sensitivities towards the application of these values and by becoming interested in their content. The former results in the law of conflicts, in attempts to integrate and balance foreign values within the decision-making process of the forum. The latter results in comparative law, in attempts to penetrate and describe foreign values through the point of view and the categories of the forum. Both the law of conflicts and comparative law are excursions outside the forum's own value system; they are attempts at exploring and manipulating legal material by people who are strangers to it.

Preoccupation with foreign values, whether for conflicts purposes or on a comparative basis, is not an innate characteristic of a legal system. Most systems in the past have shown no sign of such an interest and even today more isolated systems ignore it. These preoccupations run counter to the emotional protection which surrounds the forum's own values, and exceptional circumstances are needed for them to emerge.

The values of our own system seem self-evident to us, part of surrounding nature, the pattern of the world. Their obviousness is our security, through them do we reach out into the absolute. They give our world purpose, stability, and form. Their strength makes us ignore what appears alien, and allows us to perceive only what is familiar. For us they transform our community into the universe.

The strength of these feelings must recede and their exclusiveness diminish, before alien values can be noticed or an interest in them can appear. Co-existence alone does not bring about such a change. An affinity must develop, a sense of kinship which breaks through indifference, a feeling that the other system, within its own place and under certain conditions, is, after all, equal to our own. Then only will alien values appear relevant and their recognition impose itself. Foreign facts and events will then be felt meaningless outside their setting, their treatment distorted, incomplete, without

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those values which form and surround their existence. The forum will have to take note of these values. Only thus will its sense of justice be satisfied, only then will it consider itself—to borrow the words of Holmes—"civilized."[1] A conflicts sensitivity will thus be born, and in response to it, the law of conflicts will appear.

The same general climate is needed for the appearance and development of comparative law. Here, too, the prerequisite is emotional tolerance, the avoidance of a self-centered approach. The feeling must develop that alien values, though different from one's own, may be just as good within their own setting, that all values are human, all value approaches unique. There can be no comparison except among equals. Attitudes reflecting superiority are culture-bound interpolations of one's own values; they become exercises in collecting oddities. The growing awareness that facts have meaning only within their social setting makes a conflicts approach first possible, then necessary: the same awareness is the guiding force behind all efforts of a comparative kind. The two, therefore, always emerge together and they tend to grow parallel to each other. Comparison, in this sense, is closely related to the conflicts approach. It is a continuation and a complement to it.

From another point of view as well, the law of conflicts and comparative law are closely related. Unlike other legal disciplines they both are essentially transitory; they are the consequences of that particular phase of legal development in which value systems are already interconnected but have not yet become unified. Separation breeds differences in values, while contact between systems tends to integrate them. Instant communications, ubiquitous, all embracing, may well one day make all effective separation impossible and result in one community with values shared by all. Such a millenium, if ever it comes, will make both conflicts and comparative law obsolete and incomprehensible.

In other respects, of course, the law of conflicts and comparative law appear fundamentally different. The first is positive law, the latter reflections on positive law. Comparative law is a descriptive, non-value approach to values, an attempt to understand all values the way they exist within their setting. The law of conflicts, on the other hand, is value-colored. It assumes commensurability on the forum's own terms, it changes all those foreign values it touches.

The central problems of comparative law have to do with the transferability of values. How far can one penetrate a value system which is not one's own? To what extent can one reinterpret foreign values through the concepts and symbols of another system? What

1. Disconto Gesellschaft v. U.S. Steel, 267 U.S. 22, 28 (1925).

are the dangers and limitations of such a proceeding? The law of conflicts on the other hand, does not have to face these problems. It not only assumes commensurability, it creates it. It deals not with foreign values as such, but with its own idea of what these values must be. While it pays lip service to the finding and manipulating of foreign values, it actually remakes them in order to integrate them into its own system.

Conflicts is the forum's sense of justice at work in a setting containing foreign elements; an attempt to reach solutions where, under the sensitivity of the forum, no solutions could be obtained without foreign values being considered. But such foreign values are only noticed in order to satisfy the forum's sense of justice, and only in the way and to the extent they happen to be needed to achieve this end. The emotional correctness of the conflicts solution is independent of a correct understanding of the foreign values involved. While comparative law seems to remain a multipolar approach, the law of conflicts always is self-ended: it is the result of an egocentric outlook; it remains a single value system even though foreign values appear to be incorporated into it.

And yet, even in this respect, comparative law and the law of conflicts are much closer to each other than is generally admitted. One may well ask whether values in any case can meaningfully be approached by an outsider and whether therefore comparative law itself is not, just as the law of conflicts, an exercise within only one single value system, one's own.

Comparison, or rather the kind of bookish dictionary-inspired exercise which so often goes under that name, seems easy, but is misleading. It only results in our transplanting our own values, through the assumed equivalence of our symbols, into a foreign system where they, as such, have never existed. The possibility, on the other hand, of comparison of a more sophisticated kind, of breaking through the verbal symbolism of a foreign system and of perceiving foreign values as they actually exist within their setting, may very well elude us altogether. We may, of course, slowly become assimilated into an alien community and, thus, eventually, come to share its values, but such a community will then be no longer alien to us and its values will have become our own. A more direct transfer between value systems may well be impossible: we cannot in any other way come to share the insider's feeling as to his values; we can only obtain the outsider's notion that these values are somehow different from our own.

These difficulties can hardly be eliminated, though they can easily be overlooked. They become obscured whenever we compare

related systems, as we are so often likely to do — the common law and the civil law for example, or the French law and the German — in short, systems close enough to share fundamental values and, to that extent, each other's approaches. And when we study systems far less closely related, "primitive societies," "uncivilized countries," these difficulties will again be obscured, this time through our postulating, from within our own system, a general pattern which exists everywhere.

Yet, in spite of these limitations, what still can be achieved through comparison is both important and highly practical. There are things about a legal system which can never be seen if we consider the system in isolation: the relativity of its values, the uniqueness of its personality. Some awareness of what the others are doing, some comparison of at least a formal kind is always needed in order to see our own pattern in a more realistic perspective, and in order to find, as Dean Pound has suggested, an effective antidote to the belief that the familiar must necessarily be the only one.[2] Such awareness may also help to understand better the inner workings of decision-making: the secondary role of rationalizations, and the great freedom for maneuvering that a judge actually has. It may help us to realize how much is conventional in our interpretations and to dislodge theories burdened with the deposits of age.

In these respects, therefore, comparative law and the law of conflicts both meet and oppose each other. They are similar in that they each deal with foreign law, without actually having to understand it the way it would be understood within its own setting. They are dissimilar in that comparative law reflects back upon the observer's own system, adding something to his understanding of it, while the law of conflicts expands that system by pretending to bring the outside world within its compass. Comparative law, thus, is essentially an introspective endeavor, while the conflicts approach is expansive and acquisitive.

2. Pound, *The Place of Comparative Law in the American Law School Curriculum*, 8 TUL. L. REV. 161, 163 (1934).