INTRODUCTION TO COMPARATIVE LAW

BY

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AND

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The United States has been said to possess 'perhaps the most complicated legal structure that has ever been devised and made effective in man's effort to govern himself' (GRISWOLD (above p. 238) 3). The point of this

observation becomes clear when one sees the problems which have arisen in the United States from the complexities of the concurrence of federal and state law, and from the fact that both the United States and the several states possess fully equipped courts systems.

Under the Constitution the United States Congress has legislative competence only in specified areas: apart from currency and coin, the levying of taxes and excises, foreign affairs, and defence, the most important are citizenship, the protection of trade and copyright, bankruptcy, maritime law, and finally the control of commerce with foreign nations and among the several states. It can be seen from this that the whole of private law and the rest of commercial law fall within the competence of the 50 individual states. Given these facts, one must ask whether one can really talk of 'American law' in the way one talks of German or English law and, if so, with what qualifications.

Regarding the division of legislative power between the United States and the member states, the Supreme Court has always been able to construe the Constitution in such a way that the development of a large and economically integrated internal market in the United States has not been seriously inhibited by legal differences. Art. I §8 of the Constitution provides that the United States has power, in addition to the powers expressly attributed to it, to enact laws 'necessary and proper' for carrying these powers into execution. As early as 1819 the Supreme Court under Chief Justice MARSHALL, himself an outstanding judicial statesman, used this clause to construct the doctrine of implied powers which gives the United States very generous room for play in its legislative activities; *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). But the principal device for extending the federal powers and thereby restricting those of the states has been the 'commerce clause', that provision of the Constitution which gives the United States power to pass laws to regulate commerce among the several states. The way the scope of this clause has been gradually extended to suit the needs of an expanding economy is one of the most fascinating chapters in the development of American constitutional law. Even today the United States has no power to pass laws regulating economic matters in 'intrastate commerce', that is, matters which occur within the boundaries of one state only, but by the decision in which the Supreme Court endorsed the New Deal legislation this principle was so emptied of content that it no longer really limits the power of the United States to pass such laws if it has any reasonable interest in doing so.

But in the central areas of private law the competence of the several states is as large as ever. This means not only that the legislatures of each of the 50 states can pass their own statutes in the area of family and succession law, contract and tort, land law, partnership, insurance, and negotiable instruments law, but also that the judges in these areas are free to develop the law of their state in different directions, as in fact they often do. Thus the

United States can be seen as a gigantic laboratory for legal policy in which any state can move forward in any direction by legislation or judicial decision and thus gain experience and reach views which enrich the debates on legal policy and may serve as an encouraging or horrifying example to other states.

Of course the egoism of individual states sometimes leads them on fairly obvious grounds to marked deviations—the extensive divorce practice of Nevada and the generous company law of Delaware are well-known examples—but there are also institutions which help the cause of legal unification or help to emphasize the similarities which already exist. Here we must mention the American *law schools*. Of course every law school is located in one state or another and law schools are largely financed by the resources of their home state unless they form part of a private university. Nevertheless most law schools would not think of training their students only in the law of New York or the law of Michigan, for example; instead, these law schools teach their students, who themselves come from all over the country, a *common American law* which admittedly does not exist as positive law anywhere. Classes and casebooks by no means ignore the interesting results which particular states may have arrived at, but they are looked at as being merely local variations of a theme which in principle is unitary and they are approached with the critical detachment of a person who knows that there are always other rules somewhere which have different formulations but reach the same results. So in the training of American lawyers the critical methods of comparative law play an important part from the very beginning; at the same time the young lawyer comes to think of American law as something which is basically unitary, though this will be counteracted by the state chauvinism which he will later meet in his professional career.

Another indication of the unitary basis of American private law, despite all the local variants, is the success with which it has for some time been being compiled in the so-called 'Restatements'. Since the increasing flood of precedents was making the law cumbrous and unmanageable it seemed sensible to record it in a clearly ordered and systematically constructed 'Restatement'; this task was entrusted to the 'American Law Institute', founded in 1923 by the American Bar Association in conjunction with judges and law teachers. The following procedure was adopted. A leading scholar is selected as 'Reporter' for each legal topic; his task is to absorb all the existing case-law, to extract general rules, and, in association with a group of advisers including experienced lawyers, judges, and professors, to formulate a text which needs the endorsement of certain committees of the American Law Institute before it is published as a 'Restatement'. The task of the reporter is to lay down the law in its *present positive form* and not to improve or modernize it. Nevertheless in cases where the rules of the various states are inconsistent they may choose the solution which seems to them to be the more

progressive, even if it obtains only in a minority of states. By this means Restatements have been produced for all important areas of American private law except family law and the law of succession—for example, the general law of contract, tort, trusts, conflicts of law—and many of them have already appeared in a second edition. Restatements are rather like the Civil Law codes in their systematic structure of abstractly formulated rules, and in many cases the Continental jurist can use them as a means of easy access to the rules of American private law in the first instance. Warning should be given, however, not to use them too uncritically, for the only way to be sure whether a particular rule is in force in a particular state is by consulting the judicial decisions of that state. If the problem in question has not yet been decided or clearly decided in that state, an American judge will often have recourse to the Restatement, but will normally accord it only fractionally more weight than he would to a leading textbook, and that, in a Common Law country, is not very much.

As early as the end of the nineteenth century it was recognized in the United States that it would be very desirable to have particular topics regulated by identical statutes in all the states. On the prompting of the American Bar Association, all states eventually agreed to send three to five representatives to a national body, the *National Conference of Commissioners on Uniform State Laws*, which was given the task of drafting Uniform Acts for those areas where intra-American unification seemed especially desirable, and to propose them to the legislatures of the several states for enactment with the minimum possible amendment. This Conference met for the first time in 1892 and has since worked on many dozens of such Uniform Laws, most of them dealing with very specific and narrow questions, but sometimes also covering whole areas of law, such as the law of bills and notes. Many of the Uniform Acts so produced have been adopted by all the states, while others have had only sporadic success, but by and large the efforts of the Conference have substantially promoted legal unification in the American states, especially in the area of commercial law where the need for unitary rules is outstandingly clear.

So far, the *Uniform Commercial Code* is the most significant and successful undertaking of the Conference, in association with the American Law Institute. In 1940 the Conference determined on a fundamental revision of the existing Uniform Laws on commercial matters, of which, for example, the statute on negotiable instruments had been adopted by all states and the law of sales by most; they were then to be brought together in a Commercial Code. The work was put in charge of LLEWELLYN who left his mark on the construction, scope and methods of the Code. In 1952 a first draft was submitted for comment to hundreds of merchants, commercial agents, bankers, carriers, and warehousemen. Note was taken of their criticisms and in 1956 a final version appeared which has subsequently been adopted in all the states of the Union. Louisiana has not adopted it in its entirety, and many states found it necessary to make verbal alterations, but they do not amount to much. Thus essentially the same rules apply today in all of the United States to sale, transactions involving negotiable instruments, cheques, warehouse receipts, bills of lading, certificates of deposit, and so on, as well as to the collection of commercial paper and the very important area of credit and security, with the exception of mortgage.

Enough has been said to make it clear that there is often a confusing hodgepodge of federal law and state law. As a rule of thumb one can say that the law relating to the control of the economy is federal law, although the states often have concurrent laws or even act in place of the United States, as in the control of the insurance industry. Important areas of commercial law, especially the sale of goods and connected credit and security arrangements, are regulated by state law, but with substantially the same content in consequence of the introduction of the Uniform Commercial Code. Other areas of commercial law, such as company law (except for the federal supervision of the stock exchange and share dealings) and the law of insurance, are covered by the laws of the various states which still show marked divergencies, while the law of bankruptcy, the protection of industrial property, and maritime law fall within the exclusive competence of the United States by reason of the Constitution. In the general law of contract, in tort and land law, and in family and succession law the legal systems of the several states control; they are in general agreement in basic concepts, methods, and solutions, but often show so marked a variation on individual points that it is of the greatest importance to know which state law applies to a case which has connections with several states. Here the rules of conflicts of law, mainly unwritten, apply, being themselves part of state law and therefore capable of variation from state to state, subject to minimum standards inferred from the Constitution.

The situation in the United States is rendered even more complicated by the fact that there are complete courts systems not only in each of the several states but also in the United States. So far as the *federal courts* are concerned, by art. III §1 of the Constitution, the judicial power of the federation is vested in the Supreme Court and 'such inferior Courts as the Congress may from time to time ordain and establish'. In 1789, in one of the very first Acts passed by it, Congress exercised the power to create lower federal courts by establishing *District Courts* as federal courts of first instance and, as courts of appeal, courts which were later called *Courts of Appeals*. There are close to 100 District Courts in the United States, many states having only one while other states with large populations may be divided into two or four districts each of which has a District Court; furthermore many districts have more than one judge, so that in total there are about 650 'District Judges' who normally sit alone. For appeals from judgments of the District Courts there are 12 Courts of Appeals: the catchment area or 'circuit' of 11 of them includes several states each, and there is one for the District of Columbia

Circuit. There are about 170 judges in these Courts of Appeals who sit in benches of three. Finally, at the head of the federal courts stands the Supreme Court in Washington with nine judges.

In order to keep the Supreme Court's workload within limits, an Act of 1925 gave the judges discretion to decide which cases were important enough to justify an appeal being heard by the highest court of the land. According to the normal practice, the Supreme Court will 'grant *certiorari*' and proceed to a decision on the merits if, after a summary consideration of the case, at least four judges are in favour of so doing. If not, no reasons are given for refusal, though very occasionally one of the justices will briefly say why he would have chosen to hear the case. It does not follow from the grant of *certiorari* that there will be oral argument. The Court may decide the matter on the basis of the briefs which have been submitted; such a decision 'per curiam' is normally unanimous and contains either no reasons at all or only very brief reasons for confirming or quashing the judgment in question. In a specific group of cases the parties are entitled to a decision on the merits, for example, where the highest court of a state has held a state statute constitutional, despite attack, or a federal statute unconstitutional, or where a federal court has held a federal statute unconstitutional in a case to which the United States is a party. In these cases there must be a decision on the merits but not necessarily oral proceedings, as the Supreme Court may give a summary judgment upholding the decision in question if it is of the view that the case raises no real question of principle in federal law.

The courts systems of the different states are so diverse that one can hardly make any general statements. In rural areas trivial matters both civil and criminal are dealt with by part-time judges of the peace; they hardly ever have any legal training and the procedure they employ is a very simplified one. In the large cities the lowest courts are often the so-called 'Municipal Courts', staffed by qualified judges, which as 'Traffic Courts' concentrate on highway offences or as 'Small Claim Courts' deal with civil matters of small importance. Civil and criminal matters which are more serious first go to courts which always have a single judge, in many states called 'County Courts', in others 'District Courts', and in New York even the 'Supreme Court'; their procedure is formal and may involve a jury in specified cases. Appeals against judgements of these courts often go straight to the highest court of the state; only about 15 states with large populations have an intermediate court of appeal, thus providing three levels of court.

By far the largest number of civil suits in the United States is decided by state courts. Federal courts have jurisdiction only under specified conditions, most of which are laid down in the Constitution, for example, cases in which the United States is a party and cases where the complaint is based on a provision of federal law ('federal question jurisdiction'). The fear that the courts of a state might not afford complete justice to a party domiciled in another state explains the existence of federal jurisdiction in another class of case: the Constitution provides that the federal courts shall be competent if the parties

are citizens of, that is, are domiciled in, different states ('diversity of citizenship jurisdiction'), but a federal statute imposes a further requirement, that the matter in issue must exceed $10,000 in value. A legal person counts as a citizen of the state of its incorporation, and if it has its chief place of business in some other state it counts as a citizen of that state also.

It follows from the rules of jurisdiction in 'diversity of citizenship' cases that, to take an example, a federal court sitting in California can decide a suit brought by a Texan for damages in tort against a Californian defendant. The question immediately arises whether the federal court should apply Californian or Texan tort law or whether it may not have to apply federal tort law instead. For nearly a century after the Supreme Court decision in *Swift* v. *Tyson*, 16 Pet. 1 (1842) it was established that in areas of judge-made law such as tort, the federal courts should apply not the case-law of any particular state but rules of federal law which were to be independently developed. This decision was based on the hope that in this way the decisions of the federal courts might gradually build up a 'federal common law' which might be taken over by the courts of the several states and thus form a point around which unified American law might crystallize. This hope has not borne fruit. The courts of the states were far from following decisions of the federal courts and often enough hit upon deviant rules. This gave litigants an incentive to try all kinds of devices to bring the case before the federal rather than the state courts or vice versa, depending on whether federal or state common law offered them the more favourable rule. These unfortunate effects induced the Supreme Court in *Erie Railroad Co.* v. *Tompkins*, 304 US 64 (1938) to abandon its previous holding and decide that, except in cases controlled by a federal statute, federal courts should in principle apply the written or unwritten law of the state in which it sat. This applies also to questions of conflicts of law; thus in the example with which we started this paragraph, the federal court must answer the question whether Californian or Texan tort law is to be applied in accordance with the conflict rules of California, the state in which it sits, and not by federal rules.