COMPARATIVE LAW'S PROPER TASK FOR THE INTERNATIONAL COURT *

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Aristotle and the United Nations

In his *Politics* Aristotle said: "almost all things have already been found out but some have been forgotten, and others which should have been known have not been put into practice." [1] As he was obviously writing for posterity, we might have been deprived of his intriguing generalization had he foreseen the consistent tenacity of Roman law which seems never to have finally forgotten or neglected anything. International law has descended to us through scores of generations constantly absorbing new juristic genes from Roman law alone,—a continuous organic process in which basic principles moved from ancient Rome to Versailles.

The thesis of this discussion, however, will be that we can still take warning from Aristotle's remark. Both World Courts have failed to use a rich treasure of principles available to them in the World's national juristic systems outside of the Roman group. The United Nations' Charter, if properly interpreted by the International Court, could transform Comparative Law's inert comparison of national laws [2] into the catalytic function of finding such national principles for application by the Court and merger into the body of international law.[3]

The Law of Nations in Antiquity

The Economic Basis for Ancient Rome's International Law

The ancient Egyptians, in settling disputes to which a foreigner was a party, received and applied the laws and customs of his own

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1. Ellis, Aristotle's Politics 35 (1947), translating Book II, c. 5, 1264a.

2. Yntema, *Roman Law and Comparative Law* in 2 Law, a century of progress 364-7 (1937); Gutteridge, Comparative Law 1-8 (1946).

3. See Balogh, *Rôle du Droit Comparé dans Le Droit Internationale Privé,* 57 Recueil Des Cours 571 (Academie De Droit Internationale 1936); Levy-Ullmann, *De l'Utilité des Études Comparatives,* 1 La Revue du Droit Internationale 385-398 (1923).

country. The judge could be either an Egyptian or a fellow-citizen of the foreign litigant. Later the Ptolemies established foreign "secretaries of the market" for affording a special jurisdiction to foreigners.[4] Here were international rights akin to those yielded twenty-five or more centuries after by some Mediterranean states and by China under capitularies and extraterritoriality. Ancient Greece was apparently not affected by Egypt's example. A resident citizen of one Greek city-state would be officially entrusted by another city-state as *proxenos* to assure local protection to the latter's citizens and their interests,—about as a modern consul is today.[5] No reception of foreign law was involved. But in Rome, when a foreign litigant was a party, the *praetor peregrinus,* a special magistrate, applied the *jus gentium* (world law or law merchant or "natural law"), because *jus civile* (domestic law) was only for citizens. The praetors thus adapted Rome's law progressively to the laws of its expanding provinces,[6] and presumably of countries beyond them. It seems that the bright ancient Egyptian thread of expedient thought has been neither forgotten nor neglected but has at last been woven as Comity into the law of nations.

Although the Greeks' fixed policy was to avoid dealing with "barbarians" if practicable,[7] Rome, on the contrary, in the last century of the Republic, used Egypt and the Near East as great sources of supply. The Empire's more sophisticated demands called for goods from far beyond its provinces,—Northern Germanic and Slavic areas, India and China.[8] Some Roman sailing ships in the third century A.D. had a capacity of 250 to 500 tons,—larger than ships under Magellan, Raleigh, Drake or Hawkins twelve to fourteen centuries afterwards,[9] and about the size of hundreds of British and North American barks and brigs that between 1800 and 1850 traded around the world.[10] Quantity-production methods and wholesalers played important rôles in many fields of the Empire's economy.[11] Against this background of Rome's expansion to her zenith, let us follow her further in the law of nations.

4. 1 PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 193 (1911).

5. NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 12 (1947).

6. deZulueta, *The Development of Law Under the Republic,* 9 CAMBRIDGE ANCIENT HISTORY 866 (1934).

7. 1 PHILLIPSON, *op. cit. supra* note 4, at 50.

8. 10 CAMBRIDGE ANCIENT HISTORY 412 (1934); 12 *id.* 244 (1939).

9. 10 *id.* 413; 6 HAKLUYT, PRINCIPAL NAVIGATIONS 132, 162 (Rhys ed. 1926); 8 *id.* 1, 14, 87; GIBSON, THE STORY OF THE SHIP 25, 58 (1948).

10. MORISON, THE MARITIME HISTORY OF MASSACHUSETTS c. 5-8, 14 (1941); ROWE, THE MARITIME HISTORY OF MAINE 151-3 (1948); 1 CLOWES, SAILING SHIPS 89-92, 101-2 (1930); GIBSON, *op. cit. supra* note 9, at 57-8.

11. 10 CAMBRIDGE ANCIENT HISTORY 391 (1934); 12 *id.* 247.

ROMAN AND INTERNATIONAL LAW FROM ANTIQUITY TO WORLD WAR II

Roman Law's Extension Into National Systems

In the last century or more of the Republic and into the Christian era, Roman law was made *first* by magistrates or praetors, including the *praetor peregrinus; second,* under the Empire,—in the beginning, generally by the Senate on the Emperor's initiative, and later by the Emperor himself. These laws, as further evolved by jurists under the Emperor's special authority, led to Justinian's epochal Digest and Institutes in 533 A.D. The former contained the essential principles of modern Civil law.

The Roman Emperor, through his control of the Patriarch, in effect headed Church as well as State. This supreme dual status lasted in Eastern Europe until 1453; elsewhere on the Continent it continued only until the papacy's beginning, about 600 A.D. In Southern and Western Europe in the early Middle Ages the Church enforced Canon law, originally taken from Papal decrees based largely on Justinian and dealing chiefly with marriage and divorce, wills, descent of an intestate's property, etc. The remaining categories of private right, carried along by the states of Southern and Western Europe distinctly as Roman secular law, were partly *jus gentium* and partly maritime law derived from the ancient Rhodian code. In 1495 most of Northern Europe also came under Roman law when the Germanic Roman Empire formally accepted Justinian's Corpus Juris. In 1648, at the end of the Thirty Years War, the ecclesiastical dominance of the Church was finally broken in much of Northern and Central Europe by the Peace of Westphalia (especially the treaties of Münster and Osnabrück). On the Continent the principles of Canon law then began to be merged into the Roman-Civil law as administered by states. Their civil codes have varied widely but have remained basically Roman.[12]

Outside Continental Europe, the following areas of the world have adopted Roman law: nearly all Latin-America, French Canada (Quebec), Scotland, Louisiana, British South Africa, and to a greater or less extent, French, Dutch, Belgian, Portuguese, and some British colonial areas.[13] The Mohammedan law absorbed many Roman principles from conquered Roman territory in the Near East. Of the chief

12. 1 BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 72-94 (2d ed. 1901); 2 *id.* 635-6, 870-1; BRYCE, THE HOLY ROMAN EMPIRE 263-5, 365-6, 391-2 (1928); Yntema, *op. cit. supra* note 2, at 346-75; 1 SHERMAN, ROMAN LAW IN THE MODERN WORLD 175, 221 (3d ed. 1937).

13. *Ibid.;* LEE, INTRODUCTION TO ROMAN DUTCH LAW (4th ed. 1946).

old Mohammedan areas, Egypt, Turkey and French North Africa have adopted Roman-Civil law by codes. Pakistan and Afghanistan are the chief Islamic areas that still retain Mohammedan law in essentially pure form. As that law is personal rather than territorial, a Mohammedan has traditionally enjoyed its benefits wherever he may be in India.[14] Japan adopted a Roman civil code in 1898;[15] and China in 1929 began to absorb Civil law standards with a Code of Procedure and a Civil code initiating a process of grafting Western substantive law on China's customary stems.[16]

Russia's legal system was taken from Europe's Civil law; the U. S. S. R. has transformed it by relegating justice wholly to political policy;[17] and apparently the same process of nullification is being carried out in her Eastern European satellite states, which have had Roman-Civil law.

In Britain, after the Romans withdrew about 450 A.D., the King's legal system absorbed over the centuries a substantial aggregate of Roman law from Canon law, English university studies in Roman law, the Norman influx, the European law merchant, admiralty courts, and other influences. After Henry VIII's break with Rome all Canon law was gradually absorbed into the national system.[18] In England's common law at many points judges today are enforcing principles originated by Roman praetors, senators, and emperors, but its main fibres are indigenous.

International Law Mainly a By-product of Roman Law

In the early Middle Ages the Church was the chief continuous factor in the growth of the law of nations in Western Europe. Pope Leo III crowned Charlemagne Emperor of the Holy Roman Empire in 800. Until about 1500, aside from its attempts to reduce war and limit its cruelties, the Church acted constructively for peace by promoting and sanctifying treaties and conducting arbitrations. Churchmen formulated such modern doctrines as the freedom of the seas, the guilt of aggression, and the inherent necessity for a secular or political *jus gentium*. Meanwhile, new international law was being generated

14. Egypt: 1 SHERMAN, *op. cit. supra* note 12, at 184; 3 *id.* 36. Turkey: 1 *id.* 181-3; 3 *id.* 35. India-Pakistan: VESEY-FITZGERALD, MUHAMMADAN LAW 185, 230 (1931).

15. 1 SHERMAN, *op. cit. supra* note 12, at 297-302; 3 id. 65.

16. Thèry, *Interpretations du Yuan* in LE DROIT CHINOIS MODERNE, No. 26 13-286 (1936).

17. 1 SHERMAN, *op. cit. supra* note 12, at 194; GSOVSKI, SOVIET-CIVIL LAW 15-263 (1948).

18. Maitland, *Old English Law* in TRAILL'S SOCIAL ENGLAND 164, 313 (1893); POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (1895); 1 SHERMAN, *op. cit. supra* note 12, at 344-84.

incident to commerce and politics through revival of the ancient Roman-Mediterranean maritime law, on the Continent by statutes and in England by the courts (12th and 13th centuries); Magna Carta's immunities to foreign merchants (1215); franchises incident to the Hanseatic League (13th to 15th centuries); recognition, especially by English admiralty courts, of the law merchant (essentially the *jus gentium*); the accelerated resort to international arbitration (to be noted below); and other legal responses to an enormous expansion of international life.[19]

After the Peace of Westphalia Europe was split into about three hundred states, each intensely concerned with its own survival or dominance. At this explosive point, the ancient Roman principle of equal sovereignty, with the spiritual emphasis newly given to it by Grotius, seems to have saved Europe from engulfment in violence. Under its protection, "small princedoms and free cities," said Bryce, "lived down to Napoleon's day unmolested beside States like Saxony and Bavaria, each member of the Germanic body feeling that the rights of the weakest of his brethren were also his own." [20]

Except for the new stress upon sovereignty, international law was not substantially augmented by Grotius.[21] Sir Frederick Pollock wrote: "We should go far astray if we supposed that Gentili or Grotius revived the Roman lawyers' conceptions of *ius nationale* and *ius gentium* for a world which had forgotten them." [22] And Sir Henry Maine: "Setting aside the Conventional or Treaty Law of Nations, it is surprising how large a part of the system is made up of pure Roman law. . . . how small a proportion the additions made to International Law since Grotius's day bear to the ingredients which have been simply taken from the most ancient stratum of the Roman *Jus Gentium*." [23]

From Medieval Arbitration to the United Nations and Its Court

The pre-natal histories of the League and the United Nations can be read in the growth of international arbitration. The ancient Greek arrangements for arbitrating territorial disputes only within the family of federated Greek city-states can not be considered as ancestors.[24] Arbitration provided by Roman private law was the direct model for

19. Nussbaum, *op. cit. supra* note 5, at 23-85.
20. Bryce, The Holy Roman Empire 436 (1928).
21. 1 Phillipson, *op. cit. supra* note 4, at 96, 111-3; Nussbaum, *op. cit. supra* note 5, at 23-85.
22. *The Sources of International Law*, 2 Col. L. Rev. 511, 518 (1902).
23. Maine, Ancient Law 100, 104 (10th ed. 1912).
24. 2 Phillipson, *op. cit. supra* note 4, at 127, 152.

arbitration and conciliation agreements in the 13th, 14th and 15th centuries among European rulers, including ecclesiastical prelates, about territorial boundaries and jurisdiction, and among medieval Italian city-states.[25] Modern arbitration began in 1794 with the Jay Treaty between the United States of America and Great Britain for settling boundary and other disputes by mixed committees. During the 19th century arbitrations were numerous and the great majority led to awards or settlements.[26] The Permanent Court of Arbitration established at the Hague in 1899 was augmented in 1907 by the Good Offices Mediation Agreement for conciliation.[27] The arbitrators and mediators (not necessarily jurists) were to be chosen from standing panels. Although no dispute has been submitted for conciliation since 1938, or for arbitration since 1940,[28] the institution still exists with its simple machinery and its two *ad hoc* arbitrators or its mediator, paralleling the International Court with its elaborate procedure and its fifteen judges.

Following now the evolution of political arbitration into international judicial settlement—neither the Covenant nor its Statute expressly adopted the principles of international law except as criteria for domestic jurisdiction (Covenant, Art. 15, par. 8 and Charter, Art. 7, par. 2). But the Permanent Court repeatedly declared that it was required to apply those principles, and characterized itself as an organ or tribunal of international law.[29]

The Civil law states in the League's Assembly and Council stamped the Covenant's Statute of the Court with their predominance; and for the most part the 1945 Statute is a literal copy of its predecessor. In the Charter's Statute of the Court (as under the earlier Statute), the force of precedent, so important in Anglo-American law, was expressly rejected.[30] The traditional Roman-Civil law methods for agreement by the parties to the Court's jurisdiction are reflected in the machinery in both Statutes for (a) adherence by States to the Statute; (b) their separate formal declaration of acceptance of the Court's compulsory jurisdiction; and (c) the joint submission by the disputing States of their case to the Court.[31] Roman-Civil standards alone seem

25. NUSSBAUM, *op. cit. supra* note 5, at 33, 34.
26. *Id.* at 212-217.
27. ZIMMERN, THE LEAGUE OF NATIONS AND THE RULE OF LAW 107 (2d ed. 1939).
28. RAPPORT DU CONSEIL DE LA COUR PERMANENTE D'ABITRAGE 26, 29 (1950).
29. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942 604 (1943).
30. Art. 59 in both statutes.
31. SOHM'S INSTITUTES OF ROMAN LAW 232-4, 244, 253-6 (Ledlie's transl. 3d ed. 1907); 2 SHERMAN, *op. cit. supra* note 12, at 395-406. *Semble:* GRIOLET, 1 NOUVEAU CODE DE PROCEDURE CIVILE Art. 59 (1922-26)—*Soumission de Jurisdiction* 199 and notes; Charter, Art. 93.1; Statute, Art. 36-1, 36.2; INTERNATIONAL COURT OF JUSTICE YEARBOOK 111-12 (1946-7).

to account also for the procedural rules, adopted by both World Courts, which require no special forms of pleading or standards for admissibility of evidence.[32]

Comparative Law's True Function in the Work of the International Court

The Court's Untapped Treasure of National Laws

There is danger that the Court may never realize upon its great opportunity under the Charter for permanently enriching the law of nations. Up to 1921 the forces of history limited international law mainly to concepts of Roman-Civil law. But, under both Covenant and Charter, the Statute of the Court in Article 38 authorized the World Court to apply principles drawn from sources other than Roman-Civil law. Neither Court has used that authority. Why not?

At many points useful principles, never evolved (or contradictorily applied) in Roman-Civil codes, are clearly available from the Anglo-American and other systems. A few examples may suffice:

When is a bilateral contract completed? European Roman-Civil codes vary. French courts have mostly construed the code to require that, before the contract can be called complete, the offeror must have information of the offeree's acceptance. If acceptance is by letter, it must have been received. This is the information doctrine. The Swiss code so provides. Under the German code the doctrine is qualified by the principle that information is not required if this is contrary to usage.

Under Anglo-American law the contract is generally held to be complete when the offeree declares his acceptance, whether or not the offeror has information of it. This is the declaration doctrine. The declaration may be by dispatching a telegram, mailing a letter, or by some equivalent act. This stricter doctrine is supported by such practical reasons as: that two parties in correspondence could never perfect a contract if there must be simultaneous knowledge by both parties that they are bound; and that the information doctrine would delay the accepting offeree's execution of the order while the market might be changing against him or the offeror might revoke.[33]

Under Roman-Civil law, notably French and German, impossibility of performance, when due to *vis major, force majeure* or *höhere Gewalt,* relieves the obligor, especially a common carrier, from liability. Anglo-American law, using the *act of God* as the preventing force,

32. International Court of Justice, Series D, No. 1 (1926).

33. 1 Walton, The Egyptian Law of Obligations 132-6 (2d ed. 1923); 1 Williston, Contracts §§ 71-81 (1937), cum. supp. 31 (1949); Restatement, Contracts § 64 (1932); 12 Eng. and Emp. Digest 77-9 (1923), 1941 supp. 7.

ordinarily does not excuse the obligor unless the court can interpret into the contract the condition of such impossibility; and in American law, where the *act of God* calls for a higher degree of unforeseeability and irresistibility than do the above Latin, French and German expressions for impossibility, there are also stricter limitations on invoking it as a defence.[34]

In Continental Civil law, as in Roman law, a mistake of essential fact by one party to a contract generally renders it voidable. In Anglo-American law the contract is not voided unless the mistake is mutual or the mistake of one party is known to the other; and under the English doctrine of estoppel the party who has negligently induced the other's mistake cannot rely on it to avoid liability.[35]

When money has been paid under an unlawful contract, the Civil law generally allows its recovery. In Anglo-American law, when the parties are in *pari delictu,* there is ordinarily no such right.[36]

To what extent are consequential results, including loss of prospective profits, allowed as an element of damages, whether for breach of contract or for tort? Again Anglo-American law, and especially American law, is more liberal to the injured party than are the Civil codes.[37].

These contrasts indicate that Anglo-American principles might have special value for the Court in dealing with issues concerning treaty violation or other wrongdoing, and with reparations. When international peace depends on the sanctity of treaties, could not the stricter Anglo-American doctrines of contract make a strong contribution to the law of nations?

Is a corporation public or is it private when its shares are owned or controlled by a state, or partly by a state and partly by its nationals? Nations differ widely on the question. Legislatures and courts, British and American, have pioneered somewhat in principles that turn upon aspects of sovereignty.[38] As states resort increasingly to the corporate

34. 2 WALTON, *op. cit. supra* note 33, at 295-330; 5 WILLISTON, *op. cit. supra* note 33, § 1090; 6 *id.* § 1937.

35. 1 WALTON, *op. cit. supra* note 33, at 204-8, 210-18; 5 WILLISTON, *op. cit. supra* note 33, §§ 1557-68, 1571-9.

36. 1 WALTON, *op. cit. supra* note 33, at 347-50; 6 WILLISTON, *op. cit. supra* note 33, § 1787.

37. 2 WALTON, *op. cit. supra* note 33, at 255-68; 5 WILLISTON, *op. cit. supra* note 33, §§ 1344a-13462; 6 HALSBURY'S STATS. 112-13 (2d ed. 1949).

38. Selected: Austria,—Law of July 29, 1919, STAATSGESETZBLATT No. 389 of Aug. 5, 1919, 961; Great Britain,—(either through statute of royal charter) DIMOCK, BRITISH PUBLIC UTILITIES AND NATIONAL DEVELOPMENT (1933); GORDON, THE PUBLIC CORPORATION IN GREAT BRITAIN (1938); France,—Decree of Dec. 28, 1926, DUVERGER AND BOCQUET, COLLECTION COMPLÈTE DE LOIS 988-90 (1926); CHERON, DE L'ACTIONNARIAT DES COLLECTIVITES POLITIQUES (1928); Reed, Wehle and Palmer, *Government-Controlled Business Corporations: A Symposium,* 10 TULANE L. REV.

form for accomplishing public improvements and services with public funds, this question can well claim the attention of international law.

Is a holding company, or are its directors, responsible for acts of a subsidiary corporation? American judges and legislators seem to have anticipated other nations in establishing principles and distinctions for parent company responsibility.[39] Should these perhaps apply by analogy to a puppet state and its dictating master?

One more striking instance of juristic variance: In Roman law a lessor under a long-term or permanent lease had the right of preemption, *i.e.,* the lessee could not sell his lease without consent of the lessor.[40] Under the Mohammedan law of Shufâ the restricted Roman concept of preemption was transformed into a complex structure of public social policy limiting private right. When an owner receives an offer for his land or interest in land, he must offer it at the same price, first to any co-sharer or co-owner; second, to a party whose land enjoys an easement over the land to be sold, or to a party whose land is subject to an easement in favor of the land to be sold; and finally to neighbors in the order of their proximity, subject to certain considerations on the score of access to highways or to water, etc. When a building instead of unimproved land is to be sold, similar preemptive rights exist, first in the part-owner of a party-wall and then in neighbors.[41]

This Mohammedan national principle of priorities might afford useful analogies for adjudication of disputes over the construction or application of treaties about international boundaries, corridors, and rights respecting waters or access to them.

These few selected juristic comparisons are enough to demonstrate that there are national principles outside the Roman-Civil system that could help international law to serve justice.

79-101 (1935); THURSTON, GOVERNMENT PROPRIETARY CORPORATIONS IN THE ENGLISH-SPEAKING COUNTRIES (1937); Pinney, *The Legal Status of Federal Government Corporations,* 28 CALIF. L. REV. 712 (1939); FEDERAL BUSINESS ENTERPRISES (Gov't Printing Office 1949); Government Corporation Control Act of 1945 (wholly-owned and mixed ownership), 59 STAT. 597, 31 U.S.C. §§ 841 *et seq.* (1949 Supp.).

39. ROSSET, LES HOLDING-COMPANIES ET LEUR IMPOSITIONS EN DROIT COMPARÉ (2d ed. 1931); 3 HALSBURY'S STATS. 27, 481, 580-1, 789 (2d ed. 1949); 19 C.J.S. §§ 951, 1004; 13 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 5811, 6222 (1943); 6a *id.* § 2821 (1950); 1 *id.* § 43 (1933); Public Utility Holding Company Act of 1935, 49 STAT. 838, 15 U.S.C. § 79 (1949 Supp.); N.Y. Laws 1910, c. 480, 70, 83, 100, 188 (Public Service Law); N.Y. Laws 1926, c. 762, 101 (Transportation Companies Law); 47 CONSOL. LAWS OF N.Y. §§ 5(7), 70, 83, 110, 111 (McKinney 1950 Supp.).

40. 2 SHERMAN, *op. cit. supra* note 12, at 174-80; SOHM, *op. cit. supra* note 31, at 348-51.

41. 1 SYED AMEER ALI, MAHOMMEDAN LAW 712 *et seq.* (4th ed. 1912); VESEY-FITZGERALD, *op. cit. supra* note 14, at 185, app. iii, 230.

When Is a Principle of National Law "Accepted by Civilized Nations" So as to Be Available for Use by the Court?

The Charter's Statute, in Article 38, provides: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, . . . establishing rules expressly recognized by the contesting states; b. international custom as evidence of a general custom accepted as law; c. the general principles of law accepted by civilized nations; d. . . . judicial decisions . . . of the various nations, as subsidiary means for the determination of rules of law."

Paragraph *c* raises the question: When has a national juristic principle been so "accepted by civilized nations" as to be eligible for application by the World Court to a dispute between nations that have not accepted the principle?[42] A treaty (and the Charter is one) is to be construed liberally in favor of the state claiming rights under it.[43] Article 38's phrase *shall apply* is mandatory, although it might at least be argued that the Court's duty is discretionary when it is determining the fact of a principle's acceptance by civilized nations. Roman-Civil and Anglo-American courts have long held that optional authority to a public officer in furtherance of justice is to be interpreted as a mandate to the officer to exercise such authority for promoting justice.[44] The reasonable meaning of paragraph *c* seems to be that a principle accepted in the system of one nation or more is eligible for application by the Court to a dispute between other nations unless it is contrary to the laws of any disputing state or seriously contrary to the public policy of other nations. Professor Nussbaum seemed to favor some such interpretation of paragraph *c* when he wrote: "Furthermore, the 'general principles of law recognized by civilized nations' constitute a vast store of applicable norms. The elevation of these principles, which spring as such from the national legal systems, to the rank of an international

42. The narrower question of a resort by the Court to the national law *of a disputing state* is not being considered here. For a thorough discussion of this problem see Jenks, *The Interpretation and Application of Municipal Law by the Permanent Court of International Justice,* 19 BRITISH YEARBOOK OF INTERNATIONAL LAW 67 (1938).

43. Jordan v. Tashiro, 278 U.S. 123 (1928). 2 HYDE, INTERNATIONAL LAW 1468-1515 (2d ed. 1945); 1 OPPENHEIM, INTERNATIONAL LAW 763 (McNair 4th ed. 1928); BLUNTSCHLI, DAS MODERNE VÖLKERRECHT 253 (1868); 1 DE MARTENS, DROIT INTERNATIONALE 556 (1883); 3 BUSTAMENTE, DERECHO INTERNACIONAL PUBLICO 421-451 (8th ed. 1938); JOKL, D'L'INTERPRETATION DES TRAITÉS NORMATIFS 82-109 (1936).

44. 1 KAHL, MAGNUM LEXICON JURIDICUM 160 (1759), 2 *id.* 275; LEBRIJA, LEXICO DE DERECHO CIVIL (1944); 2 DWARRIS, STATUTES 712 (1831); STROUD, THE JUDICIAL DICTIONARY 1174-6 (2d ed. 1903). See Mason v. Fearson, 9 How. 248 (1850); Michaelson v. United States, 266 U.S. 42 (1924).

source, is of unusual interest historically—it means the revival of the *jus gentium* of old as set forth by the Romans. . . ." [45]

Professor Gutteridge's view is to the contrary; [46] ". . . the correct test would seem to be that an international judge before taking over a principle from private law must satisfy himself that it is *recognized in substance by all the main systems of law,* and that in applying it he will not be doing violence to the fundamental concept of any of those systems." After mentioning some wide variances between national legal principles in the Anglo-American system and in others, he expresses grave doubt that ". . . some underlying principle which is *common to all* these attempts to solve the problem . . . could be adapted to the settlement of international disputes. . . ." A comparison of the solutions ". . . does not hold much hope of the discovery of a principle which is *recognized by all systems or even by a majority of them.*" [47] Has not Dr. Gutteridge created the very exactions he finds it impossible to satisfy?

Professor Hudson has said that paragraph *c* gives the Court power ". . . to draw upon *principles common to various systems of municipal law.* . . ." [48]

Neither Professor Gutteridge nor Professor Hudson considers how the interpretation of paragraph *c* could be affected by paragraph *d,* which empowers the Court to apply "judicial decisions . . . *of the various nations* as subsidiary means for the determination of the rules of law." Paragraphs *c* and *d* are complementary in their coverage of legislature-made and judge-made principles. There seems to be no rationale for distinguishing between a nation's statutes and its court decisions when the question is the extent to which other nations have accepted its juristic principles. Now interpreting *d*:—Murray's *New English Dictionary* (1928) defines *various* when appearing with a plural substantive as "different from one another"; Webster's *International Dictionary* (Merriam, 4th ed.) as "different, diverse, several, manifold." The French text of paragraphs *c* and *d* is: "c. *les principes generaux de droit reconnus par les nations civilisées"; and* "d. . . . *les décisiones judiciares . . . des différentes nations.*" [49] That the English word *various* and the French word *différent* are equivalents is established by standard French-English dictionaries. *Dictionnaire de l'Académie Francaise* (6th ed.) gives *différent* as: *"Dissemblable, qui n'est point de même. . . . Différent, se dit souvent, au pluriel; De*

45. NUSSBAUM, *op. cit. supra* note 5, at 267.
46. Emphasis in the following quotations is supplied by the writer.
47. GUTTERIDGE, *op. cit. supra* note 2, at 65, 67.
48. HUDSON, *op. cit. supra* note 29, at 611.
49. Conference On Internal Organization, 15 U.N. CONF. Doc. 391 (1945).

plusieurs personnes ou de plusieurs choses considérées seulement comme distinctes." [50] In other words, paragraph *d* empowers the Court to apply judicial decisions of the *different* nations, *i.e.*, those of *any* distinct or separate nation; by the same token, it seems we must interpret paragraph *c* as empowering the Court to apply a principle of law recognized by any distinct civilized nation unless it is seriously contrary to the laws or public policies of other nations. Such a national principle then, to use Professor Nussbaum's phrases, constitutes part of "a vast store of applicable norms" that "spring as such from the national legal systems to the rank of an international legal source." [51]

The Permanent Court apparently never construed paragraph *c* or expressly considered using it for applying a national principle of one state (or even common to several) to a dispute between other states. Reviewing the history of paragraph *c* cases in the Permanent Court, Professor Hudson says: "Whether from a sense of caution or because of the nature of the cases which have come before it, the Court has never professed to draw upon 'the general principles of law recognized by civilized nations' in its search for the applicable law"; and has expressly applied only the general principles of *international* law.[52]

The Court's Opportunity and Comparative Law's Task

No decision by the new International Court has yet dealt with the question of applying to a dispute the national laws of any states other than the states before the Court; therefore the new Court is mentally free. In that freedom does there not lie an opportunity for the new Court? Will it use its power or will it refrain through what Professor Hudson suggests may be "a sense of caution"?

Whether the United Nations Organization succeeds or fails, would it not be fortunate if its International Court could at least have broadened the Law of Nations? It might do this in a great way by using its full moral force to apply in each case whatever national legal principle is necessary and reasonably available for achieving justice, thereby incorporating it into international law. By such exercise of authority the Court would create an inspiring task for Comparative Law.

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50. Dissimilar, not the same. . . . Different is often applied to the plural; to several persons or several things which are considered solely as distinct.

51. See note 45 *supra*.

52. *Op. cit. supra* note 29, at 611-12.