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Legal Policy, Technique and Research in Family Law—Some Comparative Aspects

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The title of this presentation refers to legal policy. I believe, however, that there is one consideration that could be seen as the leading objective in family law. That objective is to create good living conditions for children, in an attempt to ensure that the next generation is both clever and wise. This goal is indirectly the most important reason for the existence of the institution of marriage. Of course, the marriage institution is also independently important for the relationship between husband and wife. All other specific objectives in family law are of a more variable character and do not have, in my opinion, the same paramount importance.

Questions of legal technique are almost as important as matters of legal policy. We may be better able to deal with social issues if we assess the whole legal machinery of family law with respect to its capacity to: (1) solve problems without destroying human relations, and (2) do so in a way that facilitates fairness, foreseeability, and cost-efficiency.

In many countries, modern family law develops in one and the same direction. Two examples demonstrating this are: (1) grounds for divorce have become more and more liberal; and (2) partly as the result of changed sex-roles, joint custody has been promoted more and more. The technical method for introducing a change can differ, however. With regard to joint custody, the substance of the concept "custody" can vary considerably. For example, in the new English Children's Act the concept of custody in the traditional sense has been abolished in favor of the concept of parental responsibility. That change has been combined with an introduction of some subconcepts which give the courts competence to specify, if necessary, what each parent

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* Professor of Law, Uppsala University, and President of the International Society of Family Law. Luncheon speech delivered June 11, 1993 at the Society's North American Family Law Conference, Jackson Lake Lodge, Moran, Wyoming.

(or other caretaker) of the child is permitted to do or not to do.[1]

On a more general basis, I would like to emphasize the technical differences in legal reasoning between common law countries and civil law countries.[2] Today, legislation has increased importance for legal development in common law countries. My impression concerning family law is that in the common law countries legislation provides more open solutions than does equivalent legislation in civil law countries. The common law courts thereby continue to play a more profound role in legal development than their counterparts in civil law countries.

Against this background, consider a *hypothesis* on *differences in legal thinking*. In the law-making process, one has to find the best considerations of legal policy for solving an *individual case*. The outcome normally depends on application of a legal rule that contains the special conditions, which I for present purposes call concepts, applicable to the specific case. One might say that the legal concepts are inserted as formally decisive elements between the legal policy underlying the rule, on the one hand, and the solution of the individual case on the other hand.

My hypothesis is that legal concepts are sometimes given less importance in the law-making process in common law countries than in civil law countries. *Fair solutions* are emphasized in common law countries, while *foreseeability* is emphasized in civil law countries. Yet another way of expressing this distinction is to say that in civil law systems the final solutions to family law problems are created at an earlier stage in the law-making process. The law, as enacted by a legislature, emphasizes a specific set of conditions and by so doing intentionally cuts off a number of possible arguments that fall outside the chosen conditions or concepts.

Final solutions to family law problems in common law systems, on the other hand, are crafted more individually as the matter is heard in court. The final solution comes later in the law-making process.

I now raise the question of what legal scholars do, and what legal scholarship should imply. A simple answer is

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1 Children's Act, 1989, ch. 41 (Eng.)

2 In this paper I do not propose that either common law or civil law represent homogenous alternatives.

impossible, since legal scholarship can use many different methods. In my opinion, however, a legal scholar should choose methods that differ from those used by a judge or a practicing lawyer. Of course, there are similarities, but the differences are more important. Both a judge and a practicing lawyer work primarily on individual cases, the former to solve the case in a suitable way, the latter to protect the interest of his client. The legal scholar, however, should have as the main objective of his or her study the system of rules within a special area. A core part of a scholar's traditional legal study should be the coherence of different rules, both formally and with respect to the relationship between concepts and legal policy. In such an undertaking the study of individual cases is only a tool for a more far-reaching purpose. Such an approach offers the best potential for interesting conclusions and gives a greater possibility of influencing legal development. This approach should also be of general societal value to a country, since its legal system is scrutinized by scholars who have a systematic and unbiased attitude. No other category of lawyers, not even members of a supreme court or legislature, can claim this same attitude.

The situation in the United States is a special one. President Charles de Gaulle is reported as having once said that it is impossible to govern a country that produces 189 different cheeses. Applying President de Gaulle's comment to the United States, how does a legal scholar analyze legal concepts that are sometimes alternative or compelling and underlie the development of the law in over fifty different jurisdictions? American legal scholars nonetheless must do this and are doing it in a very interesting way, as this conference has shown.

Certainly, the interaction between legislation and case law, on the one hand, and legal scholarship on the other would be worthy of a comparative study of its own. I believe that legal scholars in the United States, who work with many jurisdictions where case law is a leading source of legal development, work and think in a manner that differs considerably from the way of thinking of legal scholars in civil law countries. My impression is that scholars in the common law tradition concentrate on finding good solutions, as far as legal policy is concerned, to social problems. Civil law scholars have a greater interest in how the rules of legal solutions should be conceptually construed or applied. The problems

facing each legal system are the same, but the chosen starting points, and manner of analysis, differ considerably.

Legal scholarship can imply the use of varying methods, including legal-sociological, legal-economic, legal-psychological, and other special perspectives. As already mentioned above, I am personally inclined to emphasize the value of analyzing the *coherence* of different legal *policies*, and above all, the coherence of different legal *concepts*. A set of rules can be seen as a building in which the foundation consists of the basic legal rules and concepts construed with respect to the chosen considerations of legal policy. In the upper floors we find more specialized rules for more specific problems. However, if one meets a problem on the second floor, one may well be required to go down and study the foundation in order to find a coherent solution.

One illustration of this analogy of legal rules as a building may be the problem of contracts. Contracts present many different problems in family law. Family law should not abstain from using agreements to achieve peaceful solutions to conflicts. Agreements cannot solve all problems, however, and some legal rules (e.g., on responsibility for children or on the basic duty to offer support during an existing marriage) should be given a compulsory character that leaves little room to negotiate a binding contract. The objective must be to find the right balance between different policy considerations and to transform the outcome into a coherent, comprehensive set of rules for a great number of questions (such as children, property, support, etc.) and different contractual problems, such as the conditions for validity of a contract and the effect of changed conditions. The analogy of a building, containing different floors and apartments, might be rather useful for describing how the role of contracts in family law should be built up and applied. In addition to the role of contracts in family law, many more areas lend themselves to studies of a systematic and conceptual character.

A second example is whether the acquisition of a professional degree by one spouse should entitle the other, on the occasion of divorce, to compensation. Three different solutions have been used in American jurisdictions to award compensation. American courts have applied rules on division of property, on alimony, and on unjust enrichment to address this question. As a legal scholar, I would find it natural to study these alternatives by analyzing to what degree it is

possible to construe the rules on property division, alimony, and unjust enrichment in a systematically coherent way with respect to the value of a professional degree.

A third problem suitable for conceptual analysis is the *relationship* at divorce between the economic issues relating to *division of property*, *alimony*, and *maintenance*. Obviously, the division of property issue can influence the need for alimony, and the topics of alimony and maintenance are linked to one another. I believe, however, that for analytic purposes it is best to treat the three issues as independently as possible. Such an approach promotes foreseeability and counteracts overbargaining and divorce conflicts. In common law there is the well known objection to this approach that it does not achieve the fairest result in individual cases. Nonetheless, within reasonable limits it is precisely the advantage of the legal method of conflict resolution that all possible arguments are not put in one melting pot but structured in advance when the rules are constructed. This is one expression of the *peace-making function* of the whole legal system. I believe that a marital property system which contains clear rules for division of property is superior to a conceptually looser system for division of separate property of spouses. Unfair result of a marital property system can also be counteracted by special rules for exceptional cases. There should be no basic contradiction between fairness and foreseeability. Both objectives should be combined.

A fourth example of a topic worthy of conceptual and systematical analysis is the treatment in American law of common law marriage and cohabitation outside marriage, in comparison with formal marriage. With a growing number of couples living together without formal marriage, there is a need for an in-depth analysis of the relationship between these three legal concepts, and their legal effect not only in family and property law but also in tax law, social welfare law and other legal areas. Courts will never perform the broad study that is required by this topic.

In conclusion, I realize that my attitudes have been a bit pretentious. I certainly cannot compete with my extremely qualified audience when I comment upon American family law. However, as the saying goes, in order to understand national law one should study foreign law. I believe that, coming from different legal traditions, we can learn much from one another.