

Prospects of International Unification of Law from a European Viewpoint

Mario Matteucci

Repository Citation

Mario Matteucci, *Prospects of International Unification of Law from a European Viewpoint*, 10 La. L. Rev. (1949)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol10/iss1/9>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Prospects of International Unification of Law from a European Viewpoint

*Mario Matteucci**

The inclusion of a special item in the agenda of the European Consultative Assembly, devoted to the tentative unification of the law of contracts among the states members of the European Union, is new evidence of the importance of the problem of coordinating and amending the legislations of the several countries in the effort to develop international commercial relations.

The unificatory activity is not new in Europe. The second part of the nineteenth century and the first quarter of the twentieth century have shown an increasing interest on the part of private and public organizations in the preparation of draft uniform laws and conventions to secure the certainty of law, a preliminary condition for a sound international trade. The utility of such uniformity is clearly proved by the conflicting rules of private international law, a source of permanent disputes. Professor Gutteridge in his recent book, "Comparative Law," has quoted a typical case decided by the English courts. A ship flying the French flag was chartered at a Danish West Indian port to proceed to Haiti and there load a cargo to be carried to England or France at the charterer's option. The ship was damaged on the voyage and put into a Portuguese port of refuge, where the master borrowed money on a bottomry bond in order to enable him to complete the voyage. The ship ultimately arrived in Liverpool. The plaintiff was compelled to pay off the bond in order to gain possession of the cargo and he sought to recover the amount so paid from the shipowner. Five systems of law were potentially applicable to the transaction.

The above remarks apply to cases of unification of already existing laws. But new laws on the same subject and of international relevance (air legislation, for instance) may be in preparation in several countries. In such instances common sense suggests the coordination of the different legislative activities. Here

*Secretary General of the International Institute for the Unification of Private Law, in Rome. This Institute was created in 1926 by an agreement between the Italian government and the League of Nations. Its charter was amended in 1939. Actually thirty governments are members of the Institute.

again unification offers a reasonable solution dictated by entirely practical considerations. Sometimes, instead of unifying legislation, it may be sufficient simply to coordinate the laws of the several countries so as to eliminate clashes between them. It is for the chambers of commerce, the great industrial organizations, the transport and insurance companies, the judges and lawyers in all countries, to point out the subjects upon which it is useful or necessary to bring the different legislations into harmony.

In the opinion of the writer, all initiatives for coordination and unification within the framework of the European Union should conform to such practical conceptions. Problems arising out of the differences between legislations cannot be solved by unifying only the rules on conflict of laws, leaving substantial law untouched. Attempts at such solutions have proved unsatisfactory. The technical nature and the political and economic backgrounds of the rules of private international law present serious obstacles to their unification. On the other hand, such unification, even if possible, would not help the judge in ascertaining and construing the foreign law to which he might be referred by the conflicts rule. Experience has shown that unification of private international law and international unification of private law should proceed and develop along parallel lines, the former filling up the gaps of the latter.

Before any attempt is made to fix the limits, the following points should be considered:

(1) Should unification follow a systematic method, starting from the general principles of law and then passing on to deal with each single institution, or should it adapt itself to the needs of and the opportunities arising from the actual state of international relations?

(2) Should unification aim at bringing the municipal laws of the various countries into conformity with a common standard; or should it be confined to the preparation of uniform rules, applicable only to the relations defined as international, leaving municipal law in force to govern all other relations.

(3) Should uniformity be guaranteed by the undertaking of two or more parties to introduce the uniform rule into their internal legislation? Or should uniformity be reached through the unilateral adoption by each state of collectively prepared rules, aside from any international undertaking? Or, as a last and subordinate hypothesis, should uniformity be encouraged by the proposal of simple standard rules, having no coercitive value, but

to be taken as a model or to be adopted voluntarily by private contracting parties?

To answer each of these questions requires consideration of a number of factors, drawn from the data furnished by experience acquired in twenty years devoted to unificatory activity and from preceding studies on the subject, particularly those of Gutteridge,¹ Schnitzer² and Ujlaki.³

(1) Systematic unification is the most attractive for legal theorists.

The international legislator of the future will have perhaps the task of preparing a universal code. We already possess a universal charter of human rights which might be the foundation stone of the great structure of universal law.

On the other hand, a systematic unification of the legislations of continental countries, which may seem theoretically easier, would not be fully satisfactory. The economic interdependence between the European continent on one hand and the United States of America and the Commonwealth of Nations on the other is so close that the bulk of commercial relations would miss the benefits of unification should the "common law" countries be left out of it.

Under these circumstances, it seems advisable to give up systematic unification in the full meaning of the word. Unfortunately, this solution also has its drawbacks. For if we unify according to excessively empirical standards, we risk, at a certain point, being stopped short by differences of principles. In this case, either the uniform law does not remove the conflict, which it simply hands on to the applicable law, or else a solution has to be sought in compromise. Now a compromise gives no satisfaction, and is liable to be revised as soon as the same question of principle is once more taken up by the international legislator in the course of another attempt at unification.

To avoid this inconvenience, it seems advisable to seek unification with a minimum of systematism. This would require a preliminary selection between those subjects whose unification appears scarcely useful and possible and those better adapted for unification. This discrimination is not difficult: the greater or

1. Gutteridge, *The Techniques of the Unification of Private Law* (1939) *British Yearbook of International Law* 37-51.

2. Schnitzer, *De la diversité et de l'unification du droit. Aspects juridiques et sociologiques* (Basle, 1946).

3. Ujlaki, *Die rechtsvereinheitlichenden Bestrebungen der Nachfolgestaaten und das ungarische Privatrecht* (*Z. Osteurop. Recht., N.F., III, 1947*) p. 561-588.

lesser interest of the subjects from the viewpoint of international relations may be taken as a standard. Once this discrimination has been made, it would seem advisable to identify the subjects whose unification is most pressing and, wherever possible, to study the drafts for unification in a logical and consequential order. If, for instance, unification of the laws on corporations and unification of the laws on the transfer of company shares were thought to be equally pressing, the first should logically take precedence over the second. If it were considered necessary to prepare uniform rules on the sale of movable property in general and on c.i.f. and f.o.b. charges, it is self-evident that the former should be dealt with first. Experience has taught that the lack of such a logical order may lead to serious consequences. Thus, if the conventions which have given a uniform discipline to international carriage by sea, air, and rail are examined, it will be recognized that entirely different kinds of carriers' liability have been adopted, and such differences are not always justified from a legal point of view. The same contract, broadly speaking, is involved and, in addition, the differences cause serious difficulties in cases of through bills of lading where various kinds of liability overlap.

But even if it were possible to lead the unification of law back to such a minimum of systematism, specialized scholars and institutions would still be well advised to apply, parallel to practical unification, a theoretical unification according to more systematic principles. In other words, while practical lawyers deal with the problem of unification only for subjects where the need for unification is felt, thus working in a fragmentary and empirical manner, scholars should put into systematic order all the legislative material—at least for subjects which seem capable of being unified—first comparing and then unifying this material by a systematic method. In this manner two parallel activities would be developed: one of them a short-term, the other a long-term task, and they might prove mutually helpful.

(2) The second question we have to put to ourselves is this: shall we unify domestic legislation or prepare international laws? Both solutions have their advantages and disadvantages. The first naturally meets with a certain opposition from legal circles which are reluctant to modify their legislation in order to adopt uniform laws. On the other hand, this solution would allow us to apply unification in its entirety and would do away with a double set of legislative rules. The second solution is the easiest to adopt, pre-

cisely because it does not change national laws as far as internal relations are concerned—but on the other hand it sets up a double system of rules for the same relations, according to whether they have a national or an international bearing. If to these two sets of rules we add the rules of private international law, it is easily seen that the judge's task becomes extremely complex.

The problem then arises of ascertaining by what factors relations should be qualified as "international." Some examples of this kind of qualification are offered by the conventions on transports and by the Geneva Protocol on the compromissory clause. The draft uniform law on the sale of goods, prepared by the International Institute for the Unification of Private Law, defines international sales as those in which the contracting parties have their places of business, or in default thereof, their habitual residences, in different countries, unless the acts of the parties constituting offer or acceptance occur in the one country in which delivery and payment are to be made. The draft on arbitration in commercial matters, prepared by the same institute, gives the following definition of "international arbitration":

"The present law shall apply when at the time an arbitration agreement is concluded, the parties thereto have their respective habitual residences in different countries where the present law is in force. This law shall apply in such a case wherever the parties happen to have their habitual residences at the time a dispute arises. The nationality of the parties shall not be taken into consideration."

A large number of the drafts prepared by the Rome institute have adopted the system of limiting the application of the uniform rules to international relations only, or else they have left the contracting parties free to limit their application to international relations, after defining the bases upon which relations should be qualified as "international." In this manner, side by side with internal law, a system of international rules of private law will be formed; it will have some analogy, as to its functions, with the *ius gentium* of the Roman epoch. This form of unification through the framing of international laws is the one which so far has proved most successful; the various conventions on transports are a proof of this. This observation, of course, does not extend to regional unification like those accomplished by the Scandinavian states.

(3) Unification through international conventions or unification through the unilateral adoption of laws collectively prepared?

To answer this question also, psychological factors, as well as the practical results to be obtained, must be taken into account. The system of unifying through international conventions meets, in the first place, with obstacles due to reluctance of governments to restrict their own initiative in the legislative field. It has also revealed serious disadvantages: the extreme slowness of ratification and the great number of exceptions to the application of conventions, introduced by means of reservations. Finally, the texts adopted during diplomatic conferences are often amended in the course of debates, unavoidably hurried, so that the initial scope of the rule drawn up by experts may be altered.

On the other hand, unification through unilateral adoption by different countries of rules prepared by common working committees has given excellent results, particularly in Scandinavian countries and in the United States of America. This system is the most elastic: it allows the national legislator greater freedom of initiative; but it deprives unification of the coercitive character inherent in international conventions.

Of course, while spontaneous adoption may be preferable for the unification of certain subjects, where absolute identity between the legal rules of various legislations is not necessary, recourse to conventions will be needed whenever it is a question of regulating certain "international public services," such as customs, transports, postal, wire and wireless communications, et cetera, requiring accurate and uniform regulations.

Finally, the system of the standard clauses, whose adoption is left to the free choice of individuals and also of states (when the latter wish to use it in their relations under contracts) may represent a supplementary means of unification; it will only apply to subjects of a dispositive character.

Having thus given a summary outline of the chief problems inherent to the unification of law, we still have to see how they may be approached and solved within the framework of the European Union.

The legal nature of this organization seems closer to a union of sovereign states than to a federation. It cannot be anticipated that, at least in the near future, the Union may be empowered to enact laws binding for the states. On the other hand, the economic ties already formed between some states of the Union—and which will certainly have to develop, in order to make the

Union efficient—will make it necessary to put into harmony that part of their legislation affected by said economic agreements.

This need for harmonizing legislations has been felt in the BENELUX countries;⁴ they have already set up a tripartite commission of an official character to study the unification of some branches of civil and penal legislation.

The independence of the states belonging to the Union, in legislative matters, must be reconciled with the necessity for making some parts of municipal legislation uniform with the object of applying economic agreements; this can be done only by setting up organs for legal coordination on the model of those already founded by the BENELUX states.

Such a coordination seems comparatively easy to organize. First, a European committee on legal coordination should be created: a consultative body made up of distinguished lawyers delegated by the different states of the Union, whose task should be to identify the subjects for which unification or coordination of legislation is recognized to be necessary or profitable. Second, a specialized agency should be used for the technical preparation of drafts for unification.

The European committee for legal coordination might meet periodically, in plenary sessions to examine plans of a general bearing or in sessions restricted to a certain number of states when the plans only concern some states.

A specialized institute which might be qualified to furnish the committee for legal coordination with the technical assistance necessary to prepare drafts for the unification or the coordination of laws—and which has been used by the League of Nations for such purposes—is the International Institute for the Unification of Private Law, with headquarters in Rome. This institute, founded as early as 1926 under the auspices of the League of Nations and still extant, was organized under a charter adopted by thirty states, most of them members of the European Union.

The two organs outlined above do not, of course, exclude the cooperation of other valuable international institutions, public or private, which have made prized contributions to the work of unification, such as the International Law Association, the Comité Maritime International, the Institut de Droit International, the Chambre de Commerce Internationale. The activity of these institutions would be much more efficient if it were based on mutual

4. Belgium, The Netherlands, Luxembourg.

cooperation, as Professor Gutteridge suggests, in his book, quoted above.

It would be too ambitious to outline a plan for the unification to be carried out in the next few years by the countries of the European Union. That unification will depend on economic agreements, the contents of which we do not yet know. Only broad forecasts are possible, based on the experience of the past and on common sense.

In the field of private law we may foresee that the unification of contracts for carriage will be completed. The Warsaw Convention on Transports by Air is being remodelled; at the same time the International Institute for the Unification of Private Law, the I.R.U. and the International Chamber of Commerce, under the auspices of the E.C.E.,⁵ are preparing a draft international convention on contracts for carriage by road. Further studies have been planned to unify contracts for carriage by river and to unify provisions concerning combined transports. In a resolution adopted by the International Bar Association at the Hague (1948) the preparation under private auspices of a tentative draft of an international uniform law of negotiable instruments, with particular reference to the Bills of Exchange Act, the Negotiable Instruments Law and the Uniform Law adopted by the Geneva Convention of 1930, has been approved.

Representation in international transactions is also being studied by the Institute for the Unification of Private Law, while the need is emerging for uniform rules on powers of attorney and for agents' contracts.

Two drafts, which had already been sent to the States by the League of Nations in 1935, represent an important contribution of the International Institute for the Unification of Private Law: a uniform law on the international sale of goods, and another one on the civil liability of innkeepers for loss or damage to their guests' property. The first of these drafts undoubtedly represents one of the pillars of international trade, which is largely based on sales and purchases.

It is self-evident that it would be very useful to put the different legislations in harmony as regards both the treatment of foreign commercial companies and the substantial regulation of such companies, particularly of business corporations. For it is

5. The Economic Commission for Europe of the United Nations in Geneva.

through these companies that capital circulates from state to state and has an equilibrating influence on international economy.

Scholars have also been called upon to examine the problem of founding a type of company having an international juridical personality.

Private international law offers vast possibilities of unification. In particular, it seems advisable to revive a praiseworthy attempt made by the League of Nations in November-December, 1929. The League then submitted to the states, at the Paris Conference, a draft convention on the treatment of foreigners. A uniform settlement of this question on the most liberal lines has become a necessity as a logical consequence of the European Union. The execution of judgments abroad, particularly of judgments enforcing maintenance between near relations, might be the object of a more harmonious and practical settlement.

All these provisions are not meant to burden the peoples of the world with a new and heavy armor of complex and muddled legislative rules—their object is to bring some order into the legislation of the various states through coordination and simplification—in such a manner that all those interested in international trade—first and foremost the State administrations—may gain a clear vision of the laws which shall govern trade.

The unification of law also requires a certain uniformity of decisions. This may be partly obtained through an accurate information service, enabling judges in the various Union countries to know what judgments have been given in other countries, particularly by the higher courts.

But to insure a uniformity of judgments on the interpretation of uniform laws a broader development of international jurisdictions, particularly of arbitration jurisdictions, will be necessary—by providing economic agreements with arbitration clauses, and by organizing arbitration tribunals in the manner technically most perfect and financially cheapest.

Finally, it is necessary to stress all those activities, in the preparation of or accompanying unification, which serve to pave the way for it or to facilitate its acceptance by the states. First of all, the comparative study of law: this method of studying law, notwithstanding the progress made in the last quarter of a century, is still very far from perfect. There are countries, and not among the least progressive, who possess neither chairs nor institutes for the comparative study of law, and even where such institutes do exist, they are largely lacking in organization and

information. Today, really efficient and satisfactory work from an instructional point of view cannot be obtained except through the collaboration of a certain number of international institutes, who should divide the work between them and pool the scientific resources at their disposal. This coordination of the comparative study of law, which seems to have been undertaken by UNESCO,⁶ is a factor of capital importance for the unification of law.

It seems advisable that any unificatory activity in the European Union be carried out in a close contact with Anglo-American and Latin American lawyers. As a matter of fact, the economic system of Western Europe is closely linked with the American continent, especially with the United States of America, so that any body of uniform rules on commercial and economic matters should be kept as near as possible to the American law.

6. United Nations Economic, Scientific and Cultural Organization.