Louisiana Law Review

Volume 35 | Number 5
Special Issue
1975

Reception of Foreign Laws and Unification of Law

Imre Zajtay

RECEPTION OF FOREIGN LAWS AND UNIFICATION OF LAW*

*Imre Zajtay***

I.

1. The unification of certain areas of the law of two or several countries can be the result of different factors and of varied procedures. It is possible that the unification appear as the consequence of the voluntary or imposed adoption of a juridical institution of one of the countries by the other countries in question. Then we are dealing with the phenomenon called the reception of foreign law. Given the unifying effect that the reception of foreign juridical institutions, should it arise, is likely to produce in the relations between the countries involved, we can affirm that the experiments made in the area of the reception of foreign law present a clear interest for attempts at the unification of law.

2. In his analysis published in 1938 in the "Recueil Lambert," A. B. Schwarz emphasized the complex character of what we call the reception of foreign law. Far from having a homogeneous and well determined content, the notion of reception in reality covers diverse phenomena of which the causes are as varied as the forms that these phenomena take or the paths that they follow.[1]

These inherent difficulties concerning the notion of the reception of foreign laws are evident even when we look at the most famous and most important reception in the history of European law, that is, the reception of Roman law. In 1947,

---

* The French version of this paper constituted the author's contribution to the Conference on "The New Frontiers of Law and the Problem of Unification" held by the Faculty of Law of the University of Bari, Italy, on April 2-6, 1975.

** Director of Research at the National Center of Scientific Research, Paris; Professor at the Law Faculties of the Universities of Hamburg and Mainz. English translation by David Marcantel, research assistant Institute of Civil Law Studies, Louisiana State University Law School.

1. Schwarz, *La réception et l'assimilation des droits étrangers*, in 2 INTRODUCTION À L'ÉTUDE DU DROIT COMPARÉ: RECUEIL D'ÉTUDES EN L'HONNEUR D'EDOUARD LAMBERT 581 (1938); German translation by H. Thieme and F. Wieacker in RECHTSGESCHICHTE UND GEGENWART, 149 (1960). For a more recent article of the same opinion, *see* SCHNITZER, *Ist massive Rezeption fremden Rechts gerechtfertigt?*, in 1 PROBLÈMES CONTEMPORAINS DE DROIT COMPARÉ 115 (Tokyo 1962).

Paul Koschaker, in his work on "Europe and the Roman Law," had to ascertain that regardless of the innumerable investigations devoted to the reception of Roman law, the real nature of this reception was not clarified.[2] In fact, for a long time the work in this field had only concerned one aspect of this complex phenomenon. Legal writers only studied the implementing of the rules of Roman private law which took place in Germany at the end of the Fifteenth century and, in a less complete manner, in certain other countries. Consequently, the reception of Roman law was considered by many as being essentially an event in the juridical evolution in Germany. The great merit of P. Koschaker's work, as M. W. Kunkel[3] emphasized, consists precisely in having demonstrated that the reception of Roman law had an appreciably more general scope. This reception was a European process and a scientific process. Thanks to this work and to a few other recent studies, henceforth we can distinguish two aspects of the reception of Roman law. It concerns, on the one hand, the reception of the *rules* of Roman private law, that is, their introduction into the positive law of certain countries. On the other hand, it concerns the scientifically-minded transformation—the *Verwissenschftlichung*, according to M. G. Wieacker's[4] expression—of law and of the manner of thought of the jurists. This was done by means of the adoption of a body of concepts, categories, divisions and principles, that is to say, of a scientific system that constituted the framework of Roman law at the time of the said European process.

The importance of this second aspect of the reception is preponderant. The scientific reception was more universal since it also spread out to countries which never received the rules of Roman law. The history of Hungarian private law furnishes an interesting example of this.[5] Moreover, the effects of the scientific reception proved to be more durable. Whereas the rules of Roman law have in general been replaced by other statutory provisions in continental legal sys-

2. P. KOSCHAKER, EUROPA UND DAS RÖMISCHE RECHT 51 *et seq.* 141 *et seq.* (3d ed. 1959). Let us recall that this work was completed on several points by the studies gathered in the two volumes of L'EUROPA E IL DIRITTO ROMANO: STUDI IN MEMORIA DI PAOLO KOSCHAKER (1954) [hereinafter cited as STUDI KOSCHAKER].

3. Kunkel, *Preface* to STUDI KOSCHAKER at XI.

4. Wieacker, *Europa und das römische Recht, Verborgenheit und Foridauer*, 3 ROMANITAS 68 *et seq.* (1961).

tems that had formerly received them, the framework of these latter legal systems still continues to rest on the concepts, categories, divisions and principles to which we have just referred.[6] It is obvious that with regard to any undertaking aimed at the unification of law, this structural unity of the continental juridical systems is of the greatest importance.

3. The questions pertaining to the reception of foreign laws can be principally divided into two categories. They concern the *factors* influencing the reception, on the one hand, and the *effects* of the reception, on the other.[7] We will try to establish, by having recourse to a few examples, whether the problems encountered concerning the reception of foreign laws permit us to draw some conclusions which may be of interest with reference to the problem of unification of law.

II.

4. The importance of the *political factor* in the process of the reception of foreign laws has been pointed out frequently. For example, in the case of the reception of the French Civil Code in a number of countries before the fall of the Napoleonic Empire, or in the reception of English law in India, the direct influence of the political factor seems to be manifest. In the case of the reception of Roman law in Germany, many centuries after the disappearance of the *imperium romanum*, the question is, of course, much more complex. Here the political factor was represented by a certain conception of the continuity of the Roman Empire, the

5. *See* Zajtay, *Sur le Rôle du Droit Romain dans l'Évolution du Droit Hongrois*, in 2 STUDI KOSCHAKER 183.

6. For a more detailed analysis of this question, *see* Zajtay, *La Permanence des Concepts du Droit Romain dans les Systèmes Juridiques Continentaux*, 18 REVUE INTERNATIONALE DE DROIT COMPARÉ [REVUE INT. DROIT COMP.] 353 (1966); Zajtay, *Begriff, System und Präjudiz in den kontinentalen Rechten und im Common Law*, 165 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [ARCHIV F.D. CIV.] 97 (1965). Hosten, *The Permanence of Roman Law Concepts in South African Law*, 2 COMP. & INT'L L.J.S. AFRICA 192 (1969); Zajtay, *The Permanence of Roman Law Concepts in the Continental Legal Systems*, 2 COMP. & INT'L L.J.S. AFRICA 182 (1969).

7. *See* Zajtay, *La Réception des Droits Étrangers et le Droit Comparé*, 9 REVUE INT. DROIT COMP. 686 (1957); German translation in 156 ARCHIV F.D. CIV. PRAXIS 361 (1957). *See also* Zajtay, *La Réception Globale des Droits Étrangers*, in 33 ÉTUDES DE DROIT CONTEMPORAIN 31-40 (Travaux et recherches de l'Institut de droit comparé de Paris, v. XXXIII, 1970); German translation in 170 ARCHIV F.D. CIV. PRAXIS 251 (1970).

politische Romidee, according to Koschaker's expression. It concerns notably the attraction that Roman law, considered as the law of the Roman emperors, particularly offered to the Holy Roman Empire. At the time of the reception of Swiss and German law in Turkey, the political factor consisted in the determination of the Turkish leaders to secularize and to westernize the law of their country.

Certainly, it is very improbable that similar situations arise pertaining to the unification of law. We especially do not believe that today, in a world torn by numerous conflicts, the idea of the unification of law offers an attraction comparable to that which, at a certain time, the idea of a return to Roman law could exercise. However, it is not less certain that the political factor retains its importance for the subject of the unification of law. At the most, we can ascertain that the evolution is marked by the ever-growing influence of factors and considerations of an economic nature. Consequently, for what pertains more particularly to the field of the unification of law, there is reason to take note of the fact that we are presently witnessing an accelerated reinforcement of the *economic character* of the factor under study.

5. The *training* of jurists and the sociology of the *legal profession* are rightfully considered as essential factors influencing the reception of foreign laws.[8] We know that in Turkey a group of jurists exercised a decisive influence on the choice of the western law to be adopted. These were the "*Lausannois*" who had studied in Switzerland and who, at the time of the reformation, had important positions in the Turkish administration. In Japan, twenty years before the draft code of Boissonade, French law had already started to penetrate the judicial life of the country thanks to certain Japanese magistrates. These magistrates, who had familiarized themselves with the French law taught in the law schools since 1872, and later at the University of Tokyo, were guided in the performance of their duties by French counselors assigned to the courts of the country. Under these circumstances, we easily understand that when it was a question of judging according to equity and reason, these Japanese magistrates referred to the principles of French law. The absence of a reception of Roman law in England is explained to a large extent by the existence of a powerful

8. For a more detailed analysis of the questions which follow, see our studies on reception which are cited in the preceding note.

organization of practicing lawyers, the *Inns of Court*. The English jurists, trained in practice and not in universities, defended the common law which was the very fruit of this practice. They refused to exchange it for another law, different from the common law, and one which they would have had difficulty in learning. On the other hand, what had facilitated the reception of Roman law in Germany was precisely the absence of a body of organized practitioners who could have been called upon to elaborate a *common law* of the Holy Roman Empire (*Reichsprivatrecht*) and to defend it. The German jurists were trained in universities. When they began to replace the popular and nonprofessional elements in the administration and in the court system, they would naturally refer to the Roman law they had learned. They introduced it progressively into legal practice and into the juridical life of the country generally.

These few examples illustrate the important consequences that the training and sociology of the jurists could have in relation to the reception of foreign laws. Of course, one could not envisage a simple transposition of these factors on the level of the unification of law. We do realize that the question of unification of law arises in conditions quite different from those that we have just mentioned. It appears certain to us, nevertheless, that the training of lawyers, especially whether they are more or less internationally minded and more or less open to new ideas, also plays an important role in the area of the unification of law. The influence of this factor appears first in the phase of writing the unified law. It appears even more so when it comes to the question of applying the unified law.

III.

6. The analogy which we have ascertained between the problems of reception of foreign laws and those of unification of law in the area of the *factors* influencing these two legislative enterprises also extends to the area of the *effects* of these enterprises.

7. We pointed out elsewhere[9] that the reception of foreign law above all constitutes a problem of a sociological nature. Indeed, the reception is not completed by the promulgation of a law decreeing the introduction of foreign law into

9. *See* Zajtay, *La Réception Globale des Droits Étrangers*, in ÉTUDES DE DROIT CONTEMPORAIN 35 (1970).

the juridical system of the receiving country. This formal reception must be followed by the effective application of the received law. We believe that analogous considerations are necessary, in the field of the unification of law. The task of unification of law does not end with the signing or ratification of an agreement by the contracting parties. The unification of the law only becomes a sociological reality when the unified law becomes accepted and particularly when it is interpreted and applied the same way in the countries concerned. This is where the above mentioned training of jurists fully reveals its importance.

8. The parallelism between the problems of reception of foreign laws and those of the unification of law can also be ascertained when one thinks of the spheres in which these two procedures can intervene. It has often been asserted that certain subjects, by reason notably of their international character or of their historical foundations, lend themselves better to unification than other subjects more distinguished by their national particularities. We will not go into examination of the cogency of this thesis nor of the limits of its validity. We will limit ourselves to ascertaining that the subjects considered as particularly favoring unification equally lend themselves, and for the same reasons, to the reception of foreign juridical institutions. Similarly, the subjects in which the possibilities of unification seem to be questionable also resist the introduction of foreign juridical institutions.

In the case of a global reception of a foreign law, it can happen that certain institutions of this law are quite easily introduced into the juridical life of the receiving country, whereas the implementing of another institution of received law encounters considerable difficulties. Let us recall, as an example, that the institution of Swiss law that seems to have caused the most serious and long-lasting problems in Turkey is the one concerning obligatory civil marriage. It is well known that the resistance to the received law on this important point resulted in the conclusion *praeter legem* of a large number of marriages. This situation obliged the Turkish legislature periodically to intervene in order to regularize the juridical status of the children born of these marriages which were in principle void.

Given the parallelism that we have pointed out between the two subjects considered, we can ask ourselves if it is possible to draw a conclusion from this experience with the

reception of foreign law which would be valid for the subject of the unification of law. In other words, we can ask whether the subject area of the conditions of form for the conclusion of a marriage, which resisted the application of Swiss law in Turkey, must be considered for that reason to be an area that does not lend itself to unification? In our opinion, this question implies an answer which is subject to qualification. Actually, when one is dealing with secular laws which are at the same degree of evolution, there is no reason to suppose that the unification of the conditions of form for the conclusion of a marriage—in case their unification has not been already spontaneously brought about *de facto* during the evolution—will raise particular difficulties. Conditions are different when, as was the case in Turkey, in one of the countries concerned this matter is governed by religious concepts and customary rules (according to the traditional Turkish concept, marriage was considered as a consensual contract not subject to any condition of form). In this second hypothesis, unification will very probably encounter difficulties similar to those that appeared at the time of the reception of Swiss law in Turkey.

9. Let us finally refer to a question which, though purely technical in appearance, nevertheless possesses considerable importance. In dealing with the subject of reception, people have greatly emphasized the problems relating to the production of an exact translation of the sources of the received law. The repercussions of this technical problem on the level of fundamental questions may be illustrated by the Turkish experience: certain divergences existing between the provisions of the Swiss Civil Code, on the one hand, and of those enacted in Turkey, on the other hand, had their only origin in the translation errors made at the time of the redaction of the Turkish Civil Code. We find an analogous problem pertaining to the unification of law. It concerns the redaction of the unification agreements in several languages. The difficulties linked to the interpretation of these texts, notably when the countries concerned belong to different juridical systems, are well known.

IV.

10. These questions, which have been summarily mentioned, only have importance as examples. They nonetheless

do show the correlation between the reception of foreign laws and the unification of law. As stated above, when the unification is accomplished by the adoption of a juridical institution of one of the countries by the other countries concerned, it is an instance of the phenomenon of reception. By the same token, we can say that in the case of a faithful reception of the law, or at least of a juridical institution of one country by another country, the result will be practically equivalent to the more or less widespread unification of the law of the countries in question.

Nevertheless, even if this correlation between the two studied phenomena is indisputable, there is reason to also take into consideration the divergences that separate them.

These divergences exist first of all on the level of the *motives* of the intervention by the legislature. The reception is a loan contracted with a foreign juridical system. This loan is motivated by the desire to transplant a juridical institution, which has been perfected and has proved its usefulness in the country of origin, into the legal system of the receiving country. Now it often happens, especially in our times, that the receiving country is a country in the process of development. In this case the reception of a foreign law essentially assumes the character of an act of liberation from the state of underdevelopment.[10] On the other hand, the unification of law is generally undertaken by countries which have attained an analogous degree of juridical and general evolution. Here the unification is generally motivated by the will of the countries involved to eliminate the conflicts and tensions which hinder their juridical and economic relations and which often have no other source than the use of different juridical techniques.

Another important divergence is found on the level of methodological questions. In the case of reception of a foreign law, the object of the reception, that is, the foreign legal institution to be adopted, has an autonomous existence anterior to its reception. It is an institution operating in its country of origin that is being considered for introduction into the legal system of the receiving country. In a case of the unification of law, the situation is essentially different. There exists no unified law until the task of unification is completed.

10. In recent literature, *see* Beckstrom, *Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia*, 21 AM. J. COMP. L. 557 (1973).

Contrary to the received foreign law, the unified law is the consequence of the combined efforts of the countries concerned. This divergence is merely noted here because an examination of the procedures leading to the elaboration of a unified law, on the one hand, and of the implementing of the adopted legal institutions, on the other hand, is outside the scope of the present article.