UNIFICATION OF CONFLICTS RULES IN RELATION TO INTERNATIONAL UNIFICATION OF PRIVATE LAW

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THE purpose of this memorandum is to delineate the relationship between two distinct approaches to the whole problem of diversity of law: unification of conflicts rules and international unification of private law. Both proceedings have the same end in view, certainty of the law to be applied in international disputes.

1. Reference to the need for unity of law should not alarm those who, in different countries, have been, and still are, suspicious and distrustful of the process rather too sweepingly called "the unification of law." Certain champions of unification are to blame for this distrust, since their extreme views do partly justify the misapprehension that the unification of law is a process for constructing utopian universal codes, through wholesale destruction of the laws, usages, and jurisprudence in each individual state, simply to satisfy an esthetic craving for juridical symmetry.

Unification of law should not be judged on the basis of such exaggerations, which lack any scientific or practical foundation. Unification of law, on the contrary, is a natural and spontaneous process, whose existence must be justified by the existing developments of relations between peoples. Manners and customs, educational methods, unconsciously tend to become uniform between nations entertaining mutual intercourse; in the same way the conception of law, so closely bound up with morals and manners, unconsciously tends to closer contacts. This trend is also due to a better knowledge of foreign law through the comparative method of studies and to the recognition that some differences, judged at first sight to be fundamental and insurmountable, are formal rather than substantial.

However, this natural and spontaneous process, slowly bringing different legal conceptions closer together, is not, of itself, the unification of law—it is only the atmosphere in which unification may develop. Unification, in its technical sense, acts on well-defined rules of law, not on general con-

cepts of law, and among such rules it selects only those particularly adapted to reach uniformity in relation to the ends in view.

What is the aim of unification? It is (and can only be) to make relations between different peoples easier and closer by getting rid of obstacles due to the diversity of laws. Outside these boundaries, unification is nothing but a mere theoretical process, a sort of appendage of comparative law, with no relevance at all to the international community.

2. Once it is reduced to its true proportions, the aspiration to unify law no longer need alarm anyone. It is only a reasonable remedy for the removal of an actual disadvantage; when the existence of a disadvantage has been recognized, it would be against reason to reject the search for remedies. Hence the problem is practically reduced to identifying disadvantages and grading them. The best investigators are judges and lawyers, for they are the ones who will be embarrassed when a case has to be decided on the basis of a law which is unknown to them, or when several laws apply to the same case, in relation to the various aspects of the transaction under litigation.

The two typical disadvantages arising from diversity of laws are: (1) the difficulty of identifying the law to be applied to the case; (2) once such law is identified, the difficulty of knowing and of interpreting its provisions. In order to remove the afore-mentioned obstacles, lawyers are pursuing two different methods: unification of rules for the settlement of conflicts of laws, and elaboration of international uniform laws. As both ways lead to the same end, it seems logical that both activities should be co-ordinated. Before studying how such co-ordination may be secured, let us cast a glance over the work that has been done in the two fields.

The need for identifying the law to be applied to international disputes among individuals is obvious. The Romans felt this necessity, and they provided for it by creating that system of international law which bears the name of *jus gentium*. In modern commercial relations, the problem has become pressing. The case quoted by Professor Gutteridge in his recent book, *Comparative Law*, is typical. I allude to the famous *Lloyd* v. *Guibert Case*[1], in which *five systems of law were potentially applied to the transaction.*

The only way to solve this problem is to elaborate a uniform system of conflicts rules and to embody it in international conventions. This method has been followed by governments as well as by private organizations of lawyers, but the achievements have not been very satisfactory, at least in Europe. The Hague Conventions represent a partial solution, confined to

[1] (1865) L. R. 1 Q. B. 115.

a section of family law and civil procedure. Perhaps the choice of the object of unification was not very happy; family law, and especially marriage and divorce, falls under the direct influence of religious, social, and traditional principles, whose diversity cannot be reconciled. More successful has been the attempt at unification of private international law in the Americas. The solution of conflicts of laws was faced by the American countries in its entirety, including civil, commercial, and judicial matters. The Bustamante Code is a complete "corpus juris" of private international law.

The small achievements attained by the unification of conflicts rules, have proved that the problem arising out of the diversity of laws cannot be solved by unifying the rules of private international law, leaving substantive law untouched.

(1) In the first place, the difficulty of unifying international private law, is due to the extreme technical character which doctrine has conferred upon it. Moreover, such unification is hindered by political principles to which the states are stubbornly attached.

(2) Even if it is admitted that some unifications can be reached on the rules governing conflicts of laws, judges and lawyers are still confronted with a difficult problem: foreign law, when it is applicable, must be known. As our documentation is far from perfect, to obtain the texts of foreign laws is a very complicated matter. The next step is to become acquainted with the interpretation given by the courts to these laws. Such research is particularly difficult when the rules to be applied by countries under "civil law" are taken from "common law." In this case the judge has to enter into the spirit of legislation and to learn its legal terminology. Now it is clear that no judge can be so omniscient as to penetrate into the spirit of all foreign legislations. A striking example of this difficulty of interpretation is offered by the various judgments rendered by continental courts concerning the powers of trustees in international loans. Such judgments have given rise to criticism.

(3) Uniform provisions for the settlement of conflicts of law will become inoperative owing to the indiscriminate usage of the public policy exception (*exception d'ordre public*).

We have said that the unification of rules on conflicts of law is a very difficult task, and in any case not quite satisfactory; hence the necessity of an attempt to unify substantive law. Such activity has developed along the following lines:

(a) As to the object of unification, two alternative solutions have been adopted: sometimes municipal legislations have been modified in order to make them uniform with a single type. An example of this extensive uni-

fication is offered by the Geneva Conventions of 1930 and 1931, respectively, on bills of exchange and checks. This solution, which meets certain opposition from legal circles of a conservative nature, would allow unification to apply in its entirety, and would do away with a double set of legislative rules. The second solution, which is easier to adopt, precisely because it does not change municipal laws, consists in unifying national laws as far as international relations are concerned.[2]

The problem then arises of ascertaining by which standard relations should be classed as "international." Some instances of such definition are offered by the above-quoted conventions and draft conventions. 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 place of business, or in default thereof, their habitual residence, in the territory of different countries, unless the acts of the parties, constituting offer and acceptance, occur in the country in which delivery and payment are to be made. A large number of the drafts prepared by the Institute have adopted the system of limiting the application of 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 standards on the basis of which relations shall be qualified as "international." This solution seems to us, perhaps, the most satisfactory, for it reconciles the needs of uniformity of law with a natural resistance on the part of states which do not wish to give up their traditional systems.

(b) As to the procedure for unifying the laws, some countries have attained unification through international conventions, while others have spontaneously adopted, without any international binding agreement, laws collectively drafted. The second system of unification has given excellent results, particularly in the Scandinavian countries and the United States of America. It has shown its superiority over the other system, for it is the most elastic, allows the national legislator greater freedom of initiative, and deprives unifications of the coercive character inherent in international conventions.[3]

[2] See the conventions on international transport by sea, air, and railway as well as the draft conventions of the International Institute for the Unification of Private Law on international sales of goods, on conclusion of international contracts by correspondence, on international commercial arbitration; *cf.* L'Unification du droit, Institut International pour l'Unification du Droit Privé (Rome 1948).

[3] Of course, while spontaneous adoption may be preferable for the unification of certain subjects, where absolute identity of the legal rules of various legislations is not necessary, recourse to conventions will be needed whenever it is a question of

(c) As regards the subject matter of unification, experience has shown that systematic unification of all private law is impossible. Family law, especially marriage, has been partially unified only among countries whose social conditions are closely related (Scandinavian countries). A very few instances of unification of the general principles of obligations and contracts have been offered by the Scandinavian countries; an attempt, without any practical achievement, was made by France and Italy with their Draft Uniform Code on Obligations.

Therefore, unification of private law for a wide international area so far has proved efficient only as regards some peculiar commercial contracts: carriage by air, by sea, by rail, negotiable instruments; postal, wire, and wireless communications; commercial arbitration. A particularly fertile field for unification is represented by the "new law," that is, the law which governs the newly arisen relations of international relevance, such as air legislation, trademarks, and copyright. In such cases the common sense of legislators (we suppose all legislators to possess a fair portion of common sense) should advise mutual contacts for the co-ordination of the different legislative activities.

3. This very rapid glance over the results of unification in the field of conflicts rules as well as in that of substantive law, has shown that none of the above systems alone will lead to a satisfactory conclusion. Unification of conflicts rules will never be complete, and even if it were complete, the problem of knowing and interpreting a foreign law could not be solved. On the other hand, the unification of private law will necessarily be limited to some branches of law where the need for uniform legislation is felt, and where such unification is not hindered by psychological, traditional, and economic obstacles. The uniform laws so far adopted leave some points unsettled, owing to the impossibility of reaching an agreement upon them. Hence the need for co-ordination of the two forms of unification; in this manner two parallel activities would be developed: one seeking the unification of substantive law, the other occupied with the task of filling in the gaps of the former by identifying the law to be applied to legal relations whose unification has not been attempted or has failed.

How these parallel activities may work out, we shall see by analyzing the Geneva conventions for the unification of negotiable instruments law in conjunction with the annexed conventions for the settlement of certain conflicts of laws in connection with bills of exchange and checks.

regulating certain "international public services," for instance, customs, transports, postal communications, requiring accurate and uniform regulations.

4. The Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, signed at Geneva, on June 7, 1930, and ratified by most European and some extra-European countries, is a successful attempt at unification of private law. This uniform law applies not only to international relations but became a part of the national legislation of the adhering states. Nevertheless, the uniform law did not settle (and it could not settle) all questions connected with bills of exchange and promissory notes: some questions were outside the scope of the law, though strictly connected with it; they belonged to the general theory of obligations and civil law. Some other questions, although included in the special chapter on negotiable instruments, were not regulated by the uniform law, as the international legislators could not reach an agreement upon them. Hence the necessity to supplement the uniform law by a convention for the settlement of certain conflicts of laws in connection with the unified matter. That Convention was signed at Geneva, on the same date as the former Convention.

The scope of this supplementary Convention is to fix the law which is to determine or regulate:

(a) The capacity of a person to bind himself by a bill of exchange or a promissory note;

(b) The form of any contract arising out of a bill of exchange or promissory note;

(c) The effects of the obligations of the acceptor of a bill of exchange or maker of a promissory note;

(d) The limits of time for the exercise of rights of recourse;

(e) The question whether there has been an assignment to the holder of the debt which has given rise to the issue of the instrument;

(f) The question whether acceptance may be restricted to part of the sum or whether the holder is bound to accept partial payment;

(g) The form and limits of time for protest, as well as the form of the other measures necessary for the exercise or preservation of rights concerning bills of exchange or promissory notes;

(h) The measures to be taken in case of loss or theft of a bill of exchange or promissory note.

The same system has been followed in the subsequent unification of the law of checks. The Geneva Convention providing a Uniform Law for Checks, signed at Geneva on March 19, 1931, was completed by a Convention for the Settlement of Certain Conflicts of Laws in connection with Checks. The points regulated by this second Convention for the settlement of conflicts of laws are partly the same as in its sister convention for bills

of exchange: capacity of the party to bind himself by a check, form of contracts arising out of a check, effects of the obligations, limits of time for the exercise of the right of recourse. Moreover a list of questions particularly connected with the payment of cheques is settled by article 7 of the Convention.

The "*règles de rattachement*" adopted for the solution of the afore-mentioned conflicts, may be summed up as follows:

(a) As regards capacity: national law, with possibility of "renvoi";

(b) For the form of contracts: the law of the territory in which the contract has been signed;

(c) As to the effects of the obligation of the acceptor: the law of the place in which the instruments are payable; while the effects of the signatures of other parties are determined by the law of the country where the signature was affixed;

(d) The limits of time for the exercise of rights of recourse fall under the law of the place where the instrument was created, and so on.

5. The method adopted by the Geneva Conventions for negotiable instruments deserves attentive consideration. Indeed, it is thought that the unification of the rules of private international law—that is, the conflicts rules—should proceed side by side with the unification of the rules of substantive law, in order to bridge the gaps that will inevitably occur in the latter. We have now an instance of such parallel proceedings, in the work being done by the International Institute for the Unification of Private Law and by the International Law Association. While the former has prepared a draft uniform law on international sales of goods and on agency in international commercial relations, the conflicts of laws Committee of the International Law Association has prepared draft conventions to solve conflicts of laws concerning the sales of goods and international agency.

Following a logical process, as the sphere of unification of substantive law expands, the sphere of unification of conflicts rules should gradually narrow down, until conflicting rules disappear altogether. But for the time being, it is not reasonable to predict that conflicts of laws will be done away with.

This co-ordination of unificatory activities, requires closer collaboration among the international and national bodies pursuing the aim of unification. A more systematic co-operation between such specialized organizations, supported by the advice and material aid of the United Nations, will certainly prove helpful in order to save money and time, to avoid overlappings, and to secure fruitful work. It must be pointed out that the

Geneva agreements on negotiable instruments—the most efficient case of unification—were principally due to the initiative taken by the League of Nations through its Economic Committee. We expect from the United Nations the same interest for the matter of unification of law; a sign of such interest has been shown by the creation of an International Law Commission with the task of codifying international law. This work of codification and unification of private law and conflicts rules cannot be confined to a single body, excluding the co-operation of other valuable international institutions, whether public or private, which have already given a prized contribution to such work. The activity of these institutions would be more efficient if it were based on mutual co-operation and if jealousy and unfair competition were replaced by mutual respect and understanding.

From the above considerations we draw the following conclusions:

(I) Unification of conflicts rules is only a part of the general problem of the international unification of law; the two activities are interdependent and must develop along parallel lines.

(II) The principal task should be the unification of substantive law; as far as such unification proves impossible or incomplete, conflicts rules should apply.

(III) A co-ordination of unificatory activities as regards both conflicts rules and substantive law, is indispensable. All national and international specialized organizations ought to keep the closest contact in order to co-ordinate their initiatives. It is also advisable that drafts of law, even of a regional character, be submitted to the attention of all governments and international organizations. No European unification should be attempted without keeping close contact with the North and South-American countries.

(IV) I venture to suggest that each country should create a national committee for the unification of law with the task of giving its opinion and making proposals to the governments in this matter.