Michigan Law Review

Volume 41 | Issue 2

1942

COMPARATIVE RESEARCH AND UNIFICATION OF LAW

Hessel E. Yntema
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Comparative and Foreign Law Commons, and the Legal History Commons

Recommended Citation

Hessel E. Yntema, *COMPARATIVE RESEARCH AND UNIFICATION OF LAW*, 41 MICH. L. REV. 261 (1942).
Available at: https://repository.law.umich.edu/mlr/vol41/iss2/4

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

COMPARATIVE RESEARCH AND UNIFICATION OF LAW *

Hessel E. Yntema †

THE current interest in international unification of law as a major objective of comparative legal research is significant testimony, in an era of accentuated nationalism, to the increasing solidarity of the modern world. In the development of this interest, Latin America has played a pioneer role. As early as 1826, the celebrated Congress convened at Panama envisaged in its deliberations what one of its members termed a "System of Public Law" for the Americas.[1] The Congress of Montevideo of 1888-1889, anticipated by the Lima Congress of Jurists of 1878, produced the first substantial and successful codification of private international law, comprized in eight treaties and recently revised.[2] Together with the *Código Bustamante*, this consolidation of the rules of private international law constitutes a notable instance of the spirit of legal unity flourishing in the Americas.

Since 1889, the successive conferences of the American States held under the auspices of the Pan-American Union have constantly promoted in numerous recommendations the codification and unification of those international branches of law that vitally concern peace and commerce in the Americas. The most recent of these conferences, held at Lima in 1938, has established an impressive organization of existing agencies for the progressive codification of international law, including in addition to the Committee of Experts and the International Conference of Jurists, a national committee for each State and four permanent committees appointed to consider, respectively, public international law, private international law, comparative legislation and the unification of legislation, and the unification of civil and commercial laws.

* Address delivered at the first meeting of the Inter-American Bar Association, Havana, Cuba, March 25, 1941. The preferences of the author as to style have been followed throughout.—*Ed.*

† Professor of Law, University of Michigan; United States member of the Permanent Committee of Habana on Comparative Legislation and the Unification of Legislation.—*Ed.*

[1] Cf. 13 BRITISH AND FOREIGN STATE PAPERS 993 (1848).

[2] For a contemporary description of the Montevideo treaties, see Pradier-Fodéré, "Le congrès de droit international sud-américain et les traités de Montevideo," 21 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉ 217, 561 (1889). The recent revision is discussed by Rabel, "The Revision of the Treaties of Montevideo on the Law of Conflicts," 39 MICH. L. REV. 517 (1941).

This organization provides an eminently practical procedure for the consideration and approval of projects to harmonize the laws in this hemisphere. As such, it constitutes an invitation to comparative research on the part of jurists and a challenge to the bar in each State.

If it were necessary to demonstrate that the objectives of this organization are attainable, allusion could be made to the profound influence that the American Bar Association has exercised upon the course of uniform legislation in the United States. Prior to the formation of the Association in 1878 in order, among other things, "to promote uniformity of legislation throughout the Union,"[3] a crying need had developed to unify various branches of commercial law, but there was no effective mobilization of available forces to meet the need. The activities of the Association, to instance but a few of its achievements, have inspired the creation of the National Conference of Commissioners on Uniform State Laws in 1892, which has since drafted and effectively promoted the adoption of uniform laws on a variety of subjects in the several States, as well as the enactment of the Federal Bankruptcy Act of 1898 and the recent adoption by the Supreme Court of uniform rules of procedure in civil cases, an event that is destined to have large influence in promoting uniformity of practice. In addition, a committee of the association prepared the way for the establishment in 1923 of the American Law Institute, which has now substantially completed the Restatement of the common law, affording a basis for the eventual consolidation of the vast mass of precedents covering the more important branches of private law.

This example suggests the possibility of an analogous development on the larger platform of the unification of Inter-American law. As such unification will necessarily presuppose comparative study, it seems therefore appropriate to define the criteria of this type of legal research and to estimate their significance for the work of unification. It is well to scan the lines before essaying the part.

Comparative legal research, to which then we may briefly refer, essentially imports more adequate methods of scientific investigation in the field of law.[4] The historical and analytical modes of thought that superseded the natural law rationalism of the Age of Enlightenment have accustomed us to conceive legal problems in positive terms, to

[3] Constitution of the American Bar Association, Article I, 1 A. B. A. REP. 30 (1878).

[4] For more extensive discussion and references, see Yntema, "Roman Law as the Basis of Comparative Law," in 2 LAW; A CENTURY OF PROGRESS, 1835-1935, 346 at 364 ff. (1937).

regard law as eminently traditional and territorial, an expression of national culture embodied in the fiat of a sovereign state. That this positivistic point of view is advantageous to regulate the administration of justice and to systematize existing law, is obvious; as contrasted with natural law theories, it has the great virtue of focussing upon the actual rules and particulars of each legal system instead of vague universal abstractions.

And positivism is sufficient when the times are self-sufficient. But, for an epoch of change, when social conditions and ideals are subjected to critical inquiry, when the agencies of communication are multiplying the relations among the peoples of the world, whether of peace or of war, and economic unities transcend ancient political boundaries, the tenets of positivism are inadequate in at least two respects. In the first place, its emphasis upon existing law furnishes no light to guide inevitable change; the vital decisions which control the future legal order are without its scope and have to be made empirically in the obscure processes of legislation and administration. In the second place, the prevalent notion that law follows the flag is not congruous with the true conception of science. Comparison, Munroe Smith stated some time since, "is preeminently *the* scientific method. . . . A science of English law or of Anglo-American law is as inconceivable as a science of Anglo-American ethics or economics."[5] As C. K. Allen has justly observed, comparative law is not a body of law in a positive sense but a method of scientific inquiry.[6] It represents an effort to transcend the limitations of both the natural law and positivistic points of view, to approach legal problems, as it were, from without, from a cosmopolitan, actualistic, and therefore relatively objective, standpoint. Far from ignoring the peculiar conditions and techniques of each legal system, it seeks to explain and unify them in general terms predicated upon comparison with corresponding items in other systems. Confessedly, its purpose is ultimately practical, as its spirit is scientific.

It would lead too far afield for this occasion to sketch the historical background or to analyze the logical implications of the foregoing attenuated suggestions, or even to consider cursorily the conceptions that have inspired the recent development of comparative law, such, for

[5] Munroe Smith, "Roman Law in American Law Schools," 45 (36 N. S.) AM. L. REG. & REV. 175 at 182, 183 (1897), reprinted in MUNROE SMITH, A GENERAL VIEW OF EUROPEAN LEGAL HISTORY 256 at 263, 264 (1927).

[6] Allen, "Jurisprudence—What and Why?" 42 JURIDICAL REVIEW 275 at 287 (1930), reprinted in ALLEN, LEGAL DUTIES 1 at 12 (1931).

example, as Maine's comparative-historical method, Saleilles' idealistic thesis of natural law with variable content as the object of comparative investigation, Lambert's legislative common law, Rabel's systematic-dogmatic comparative law as distinguished from ethnological jurisprudence and historical comparison, and the like.

It is, however, pertinent to note the common denominators in such conceptions, as indicating essential considerations to be borne in mind in connection with efforts to promote the unification of law. In the first place, the method of inquiry commonly proposed is objective; comparative law is considered an historical or factual study requiring extensive observation and comparison of legal phenomena. In the second place, as has been stressed notably by the two chief exponents of comparative law in recent years in France and Germany, Edouard Lambert and Ernst Rabel, the inquiry is functional. That is to say, comparative law endeavors to relate legal rules and institutions according to their social and economic operation and significance, and not merely in their formal aspects in the manner of analytical jurisprudence. In the third place, in contrast to the earlier surveys of so-called comparative legislation, emphasis is laid upon systematic analysis, upon law instead of laws, or, in other words, upon the necessity of considering legal institutions in the context of the legal systems of which they form part. Finally, it has been recognized in recent years that, to avoid futile diffusion of effort, comparative legal research must concentrate upon a limited number of comparable legal systems; the sterile hypothesis of positivism is commonly rejected, and an ideal basis, confirmed by scientific comparison, is sought to synthesize the diverse legal systems that have divided the allegiance of the civilized world.

It is true that comparative law has typically been advocated for local purposes. The use of foreign legal materials as a source of models for legislation elsewhere has been doubtless the predominant, as it was apparently the earliest, form of comparative legal study. In this connection, it is of interest to recall that Lycurgus and Solon are said to have framed their laws after foreign prototypes and that the revival of interest in comparative legislation in the nineteenth century had chiefly this consideration in view. It has also frequently been observed that comparative legal studies form an effective means not only to obtain some appreciation of foreign legal systems but more especially to inculcate a more penetrating insight into the system in which the student is trained. In addition, Beckett, Rabel, and others have recently developed a school of thought that looks to comparative law for the solution of the difficult problems arising in conflicts of laws involving

divergent legal concepts, the so-called problems of qualification or characterization. In these directions, comparative law can perform obvious services. But its peculiar and most significant purpose, to which these are relative, is the unification of law. This brings us to the second phase of the subject matter under discussion.

This purpose, it may be observed in the first place, is fairly analogous, in kind if not in prospective scope, to a trend that has characterized the evolution since the fall of the Roman Empire within the several legal systems of the civilized world, namely, the fusion of local laws into larger legal unities more nearly corresponding to practical needs. In England, the subordination of local customs started in the twelfth century through the creation of a central system of justice. In Spain, in the following century, they were superseded in large part by *Las Siete Partidas*. In France, the process of unification, measurably advanced by the end of the sixteenth century through the reception of the custom of Paris as a subsidiary common law, was completed in the Code Napoleon. In the Low Countries and Germany, the reception of Roman law culminating in the sixteenth century led to a fusion of this alien system with the local Germanic customs in the so-called *Pandectenrecht* that has in turn formed the basis of more recent codes. In the United States during the past century, there has been an analogous integration of diversified elements with the received English law, a process profoundly influenced in recent years by the national law schools, by the adoption of uniform state laws, and by the expansion of Federal legislation.

If these familiar histories lend countenance to the thesis of comparative law, not yet adequately proved, that comparable legal institutions appear under comparable conditions so as to warrant the possibility of eventual unification of law in larger areas, they do not lend the hope of its easy or early accomplishment under normal conditions. Even in limited national units with a common cultural background and under the stimulus of political unity, unification of law has been a long and often incomplete process. It would also seem that certain general conditions are congenial to the process: first, the existence of a felt community of interests, usually but not always marked by corresponding political organization; second, a sufficient preparation of the bases of unification, a condition which supposes that the elements to be unified have reached the requisite stage of precipitation; and third, an appropriate procedure or organization to implement the process. In other words, although under stress of necessity, local laws have at times been superseded by novel uniform legislation, typically there is required sufficient

comparative understanding of the laws to be unified, as well as an adequate motive and an effective machine.

These remarks may be supplemented by a few practical suggestions respecting the technique of unification. In the first place, it is obviously desirable to encourage more intensive development of comparative legal studies. Thereby the attention of a larger number of the members of the bar will be attracted to the legal problems of other countries and a basis for mutual understanding extended. Moreover, such a development will increase the too limited group of individuals interested and qualified to undertake the comparative research requisite for the unification of law.

In the second place, as H. C. Gutteridge has pointed out,[7] the work of unification has three distinct phases that should be kept separate, namely, the preliminary comparative study of the subject matter to be unified, the formulation of concrete proposals for unification, and the official diplomatic or legislative implementation of such proposals. As appropriate official agencies exist for the last two of these, further comment may be limited to the first phase of preliminary investigation. This will necessarily involve comparative analysis of the pertinent rules of law as they actually operate in the respective legal systems, and determination of the extent to which there are divergencies in the rules in question and the extent to which such divergencies, viewed in the light of the business practices and legal procedures in which the rules function, are significant. For this species of research more or less independent individual investigation is indicated, supplemented by suitable facilities to obtain the necessary data.

In the third place, it is worth emphasizing in this connection that unification of law has very practical aspects. It involves more than a theoretical synthesis of existing law. It is not necessary to emphasize before lawyers, for example, that the bar is peculiarly and justly sensitive about possible changes in legal procedure; for this reason, specific account should be taken in the study of unification of possible difficulties on this score. The same counsel applies to the interests of the business and commercial world that may be affected. In short, the subject matter must be studied, not merely *in abstracto*, but from a functional point of view.

This leads, in the fourth place, to the suggestion that, at least in the initial stages, it will be eminently wise to limit an effort to harmo-

[7] Gutteridge, "The Technique of the Unification of Private Law," 1939 BRITISH YEARBOOK OF INTERNATIONAL LAW 37 at 42.

nize laws affecting a number of states to what is feasible as respects both subject matter and sphere of application. Thus, while it would be apparently advantageous to unify certain aspects of commercial law, there are other branches of law that distinctly involve local beliefs and customs, such, for example, as those affecting family relations, which there is no occasion to disturb. On the other hand, it will be expedient to limit a program of international unification to the international aspects or applications of the laws to be harmonized. The alternative, occasionally proffered, is to standardize each subject for domestic as well as international purposes. Obviously, such a utopian scheme would greatly and gratuitously increase the difficulties, formidable enough at best, in the path of international unification and even jeopardize its progress. For example, in a federal union such as the United States, the adhesion of the several States as well as the Federal Government would presumably be required to give effect to proposals concerning matters within the province of state legislation. If not required, their adhesion would at least be a just condition. Nor is it justifiable under the given conditions to attempt to unify domestic laws except for international purposes. Such restriction of the unification program to the international applications of the respective laws would concentrate effort where it is appropriate and at the same time furnish a model for the eventual further assimilation of the domestic laws as may in the future appear requisite.

These few comments respecting the technique of unification of law may be concluded with the obvious recommendation that, in the process, account should be taken of comparable developments elsewhere. The more so, as the laws of the Americas stem from the streams of European legal culture and form part, but only part, of the complex of institutions that regulate the commerce of the world.

There is a saying that the twentieth century belongs to the Americas.[8] As the reverberations of war roll across the oceans, the saying may prove true, provided that, in the development of our material resources and the amelioration of social conditions on these continents, the ideals of justice, liberty, and peace, which characterize civilization, are maintained. In the presence in this New World of the two dominant legal cultures, the Anglo-American, represented by the Dominion of Canada and the United States, and the Romanic by the Latin-American States,

[8] Thus, Pradier-Fodéré, "Le congrès de droit international sud-américain et les traités de Montevideo," 21 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉ 217 (1889).

lies a singular opportunity to contribute to these ends. A reconciliation of the laws regulating Inter-American relations, predicated upon these two systems and stimulating fruitful exchanges of ideas, which incorporates the highest and most humane principles of justice, is calculated to stir the imagination of the bar in every State. It is an enterprise which will impressively promote the development of culture and commerce and further consolidate the solidarity of the Americas. Its accomplishment will stand as an exemplar of the possibility of peaceful progress in a world at war.