CHAPTER IV

Unification, Coordination, Minimum Standards and Common Core of Laws

Unification of Laws

The most dramatic appeal of comparative law, is world common law. Cicero is said to have dreamed of 'one eternal and unchangeable law... valid for all nations and at all times.'[1] The ideal dominated the legal minds for many years. In its modern manifestation the movement, paying obeisence to practicality perhaps, branched off into small selected fields. Both official and academic endeavour lent authority to such multifaceted approach in the nineteenth century. The persons responsible for this effort range from King James I (whom Gutteridge calls the "first of the unificationists")[2] to Professor Leon Levi. Though they did not by themselves succeed in bringing about any substantial unified laws, as a result of their inspiration, however, the latter half of the nineteenth century witnessed a growth in the impulse toward international collaboration in legal matters. The Berne Convention of 1890 on the Carriage of Goods by Rail, the General Postal Convention of 1874, the Berne Convention of 1886 on Copyright, the unification in 1881 of the laws of the Nordic countries relating to negotiable instruments, etc., in one way or another can be related to this spirit.

The wave of enthusiasm for unified law gained renewed momentum with the establishment of the League of Nations and the International Labour Organization after World War I. These organizations did some useful work in this direction through their legal sections. But, the work for reasons discussed below, remained fragmentary and spasmodic. With the shattering impact on the minds of men during World War II and the developments thereafter it came to be generally believed that unification as such is an unrealizable ambition. Several reasons[3] are adduced to this equally dramatic abandonment of the dream of unification. The first reason is that unificatory movements have proved to be unpopular with practicing lawyers who have little time for such things, and have made little appeal to the general public who can hardly be expected to get excited over unification of bills of exchange or sale of goods. Secondly, somehow they hurt the national *amour propre*, in that, adoption of a unified

1. See F.C. Auld, "Comparative Law", 26 *Can. B. Rev.* 361 (1948).
2. H. C. Gutteridge, *Comparative Law*, 145 (1946). Gutteridge discusses in Chapters XI to XIII, with his usual dispassionate objectivity the movement for the unification of private law, the nature and characteristics of unified law and the mechanism of unification.
3. For a neat summary of these reasons see Chapter XII of Gutteridge, *Ibid.*

law by implication suggests individual national laws are inadequate. Thirdly, national laws being the product of peculiar socio-economic environment of a country it would appear to be unwise to suggest a uniform set of rules for countries with varying cultures. Thayer voices the misgivings in this regard of the modern comparatist this way :

> "These are pretty ideas, but they lack practicality. Even if the workers in the vineyard were dealing wholly with what might be termed civilized countries—and that is by no means the case—they still would be dealing necessarily with countries in which economic, political and social conditions show considerable variations. Law is a reflection of these conditions, and the mere fact that some particular principle or rule of law is perfectly well adapted to the life and times and social conditions of one country does not mean at all that it is going to be equally satisfactory if applied to the life and times and social conditions of some other country where those factors are entirely different. As a practical objective, unification is a trifle naive."[4]

Attacking the very foundations of unification Schlesinger points out that "in a world moving in the direction of pluralism and tending to affirm the nature of diversity and mutual tolerance, we cannot expect monotonous unification."[5] These are very convincing arguments. But a few scholars even now recommend promotion of this ideal. According to these scholars the efforts towards unification should not be made with an effort to usher in the new law of the world in the immediate future. They would prefer to wait for the day when by a slow and persistent labour jurists are able to find a uniformity of legal principles.[6]

Gutteridge brings a balance to this controversy when he says that the problem of the ultimate nature of a *droit universe* depends on "the political aspect of the situation."[7] While dismissing general unification as both impractical and undesirable and urging a restricted programme of unification as a workable objective, Gutteridge points to the desirability of "the removal of differences or rules which are obstacles to free and cordial intercourse between the nations or may impose unnecessary hardships on individuals."[8] Schmitthoff also believes that the success of the unificatory movement is more conspicuous in the limited space.[9] The fields ripe for such unificatory efforts are listed to include private international law, commercial law, maritime law, air law, and labour law, as well as the law of patents, trademarks and copyright. However, even in these fields a word of caution is indicated :

> "Unification can only be achieved by lengthy and patient efforts which will ultimately convince those in all countries, who are in a position to sponsor and carry through changes in the law, that it is a matter of urgent necessity to take steps in order to remove sources of inconvenience and friction in the international sphere."[10]

4. See Gutteridge, *Comparative Law* 156 (1946).
5. R. B. Shclesinger, *Formation of Contracts—A Study of the Common Core of Legal Systems*, Vol. I, 5 (1968)
6. G. Escarra, "The Aims of Comparative Law", 7 *Temp. L. Q.* 309 (1933).
7. Gutteridge, "The Value of Comparative Law", *Journal of the Society of Public Teachers of Law* 78 (1931).
8. Gutteridge, *Comparative Law* 156 (1946).
9. M. Schmitthoff, "Science ofComparativ Law", 7 *Camb. L.J.* 109 (1939).
10. Gutteridge, *Comparative Law* 157 (1946).

Again, the unification of, and synthesis in, the laws of the world, in the words of Escarra, "can only be possible after several centuries of analysis and, probably, only through the laboured efforts of generations of jurisconsults."[11] McDougal sees no alternative to such a study. Faced with the formidable task, he recalls the saying of a great scholar that "the standard of human performance is apt, though not sure, to rise in proportion to the magnitude of an undertaking."[12]

Coordination of Laws

The magnitude of the task prompts some scholars to recommend organized attempts to *coordinate* the existing legal systems.[13] By reference to the Hague Rules, 1921, which after having been adopted by the Brussels Conferences of 1922 and 1923 were eventually enacted in different countries, it is suggested that such coordination work may sometimes lead to unification. Such coordination of laws can be said to have taken place to a considerable extent amongst member-states of the Council for Europe, the European Coal and Steel Community, and the European Economic Community.

It must be pointed out, however, that such coordination has been possible in very limited fields. Moreover, the political climate, as in the case of unification, and the desire for functional unity amongst European countries leading eventually to political unity, have been responsible for this limited coordination. The political climate thus can be taken to be a fair measure of the *extent* of coordination of laws. Without going into the debate over the limits of functionalism as a means of world integration we can simply point out here that however desirable and practical these means may be it is possible only between countries with common culture and legal systems. It is interesting to speculate as to how much the common law system is responsible for French vetoes over British entry into EEC.

Minimum Standards

Another suggestion in this context warrants allusion. In contradistinction to unification and coordination, the field of human rights, it is suggested, opens up a fertile field for comparative research. The Human Rights Conventions proposed by the United Nations presuppose that certain rights are fundamental and inalienable. Nonetheless, the difficulties and vissicitudes that these covenants have been undergoing in the process of adoption show that not all the member states of the UN have identical notions about the inalienability of these rights. It would indeed be a rewarding undertaking to probe into what has been called as the minimum standards. Professor John Hazard draws an important distinction when he says: "No one asks that laws be uniform in all states, but rather that minimum standards be met..."[14] Pointing to the refusal of South Africa to meet such minimum standards and the consequent international tension Hazard stresses the importance of comparative study of laws to ascertain what those minimum standards are.

The enquiry could be conducted from either end : by taking the UN Human Rights Conventions as the model and seeing as to how far these

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11. Escarra, *op. cit.*, 309.
12. McDougal, *op. cit.*, 57.
13. M. Schmitthof, *op. cit.* 109-110.
14. J. N. Hazard, "Comparative Law in Legal Education", 18 *U. of Ch. L. Rev.* 272 (1951).

rights are reflected as minimum standards in national constitutions and laws of, say, a selected number of the emergent Afro-Asian states; or by holding an independent enquiry into what the developed and the underdeveloped countries regard as minimum standards and comparing those findings with the UN Covenants. Analytical studies of the minimum standards of human rights covering a number of countries could be made, for instance, on the status of organized political opposition, the right to marry and divorce, the right to enter into fair and unrestricted trade, and so on. The list is unending and the rewards attractive for the comparatists.

Common Core of Legal Principles

The preceding analysis goes to show that unification of laws has given way to kindred movements such as coordination and harmonization, minimum standards, etc. The most important of the modern movements, as an alternative, however, to the idea of one code, is the one proposed by R.B. Schlesinger recently under the caption, "Common Core of Legal Principles". Since this theory is likely to dominate the stage for quite some time to come the remaining section of the chapter is devoted to the presentation, examination and critique of the same.

Schlesinger feels that since unification is possible only in limited fields and is time-consuming, the more tenable goal would be finding a common core of legal principles. He clarifies at once that the very, conception of "core" presupposes differences in detail, on the other hand, outside of that common core the detailed legal rules followed by the various nations necessarily differ, and should differ."[15] The starting point for Schlesinger's theory of common core is Article 38(1)(*c*) of the Statute of the International Court of Justice which enjoins the Court to apply, *inter alia*, the "general principles of law recognized by civilized nations" in deciding cases between states. In very many cases, according to Schlesinger, the international tribunals have drawn upon this source of law. Then the question arises, runs the argument, as to how the international courts come to the conclusion that a particular principle is a general principle of law recognized by civilized nations. Either it is pre-accepted that a particular principle is a general principle or not. If it is not, as is the normal case, on what basis do the judges decide. More often than not though the judges declare that they are depending upon general principles, in fact they rely on their intution, (which Schlesinger calls "judicial hunches") And the intuition of each individual judge varys according to his legal background. Unfortunately, Schlesinger concedes, it is not the fault of the judges. In the absence of predetermined general principles, their intuition in the garb of such principles becomes the basis of the judgment.

Schlesinger complains that the comparatists, on whom this duty justly falls, have failed to give an answer to this question. What are the general principles of law, he asks, which are recognized by civilized nations?[16] In this field of law the comparatists have to make a major contribution. General principles of law as and when established by comparatists shall form an important source in the application of international law, says Schlesinger. With the identification of these principles a foresight shall develop which will help in the drafting of agreements with a view to

15. *Op. cit.*, 741.

16. Schlesinger, "Research on the General Principles of Law Recognized by Civilized Nations", 51 *Am. J. Int'l., L.* 735 (1957),

avoid the pitfalls of the past. It will also help in the functioning of the institutions. The utility of general principles is not limited to Art 38 only, according to Schlesinger. These principles may be useful in many other ways. Schlesinger cites the International Commission of Jurists which said

> that an appeal to the laws and basic principles of justice which are recognized by all civilized nations may carry weight where political arguments fail.[17]

But the basic fact remains that to play any decisive role, first these general principles of civilized nations have to be identified. Is it possible to find out and formulate a core of legal principles which are common to all civilized legal systems? If it were possible, states Schlesinger, the "establishment of such a common core might lead to practical results in a number of areas of legal endeavour."[18]

How does one go about locating this common core of legal principles. Schlesinger has some useful tips on the subject. The first problem which we must encounter while undertaking common core research is the relation of the national legal systems for study. There are certain factors beyond our control which compelus to select the legal systems. Finances and human resources pose a great limitation. Again, it is humanly impossible to tackle each and every national legal system. Then the personnel needed for such an undertaking has to be a highly trained one. It is difficult to find a large number of people to work on such projects. These limitations compel us to select certain legal systems for comparative study. The next question is what kind of legal systems should be selected.

We have argued elsewhere in the monograph that the relevance of a particular legal system is to be judged on the basis of the subject of enquiry. Problems of democratic institutions, for instance, are susceptible to comparison with the highly developed legal systems of the West. Again, there is hardly any meaning in trying to learn from the developed nations on issues related to development. A comparison in this field with the methods adopted by Afro-Asian countries of the same level of economic standards perhaps might yield useful result. And so on.

Critique of Common Core Research

The utility of common core research can be assessed in the context of a particular project which has attracted the attention of world scholarship recently. We have in mind the Cornell Project on the *Formation of Contracts*.[19] It is well-known that the project was conceived by Professor

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17. Editorial entitled "Hungary", in the News letter of the International Commission of Jurists, (April 1957), 3.

18. Schlesinger, *op. cit.* 739.

    Jenks had asked the same question and answered in the affirmative but with a different terminology:

    > "Can we deduce a sufficient consensus of general principles from legal systems so varied as the civil law with its multifarious European, Latin American and other variants. The common law with its variants, Islamic law with its variants, Hindu Law, Jewish Law, Chinese Law, Japanese Law, African Law in its varied forms and Soviet Law to give us the basic foundations of a universal system of international law?" He believes that we can deduce such a consensus.

    C. Wilfred Jenks, *The Common Law of Mankind* 106 (1958).

19. R. B. Schlesinger, *Formation of Contracts—A Study of the Common Core of Legal Systems* (1968). 2 volumes.

Schlesinger of the Cornell Law School and was consummated after ten years' collective effort of 9 jurisconsults from as many countries. In the words of Schlesinger, the project was launched with a view to ascertaining, an important area of the law of contracts, the extent to which there exists common ground, or a common core, among a major portion of the world's legal systems. The over-all aim, according to Schlesinger was two-fold: "(1) to enhance professional knowledge in the selected area of contract law by finding and formulating the common ground as well as the differences among legal systems, and (2) to test the feasibility of the research method developed and used in the course of the Cornell Project."[20]

Explaining the enormity of the task Schlesinger explains that a fundamental and unalterable fact of multilateral comparative research is that no single individual, however learned, possesses enough knowledge of diverse legal systems to assemble and to understand correctly all of the theoretical and practical information on national laws which forms the necessary raw material for comparison. Teamwork of a number of lawyers, each of whom must be thoroughly familiar with doctrine and practice in one or more of the legal systems chosen, thus seems to be indispensible, says Schlesinger.[21] Accordingly, a team of experts from France, Italy, Australia, Germany, U.S.A., Switzerland and India were assembled covering as many legal systems. This excellent team produced what is generally conceded as a monumental work in two volumes.

The work of the project was divided into parts. The project director circulated a working paper which stated the problems to be investigated and raised a number of questions with a view to elicit information on the legal systems to be studied. The experts, in response to the working paper, sent their individual reports. These individual reports were studied by all the experts and elaborate discussions were held. As a result of these discussions, there arose certain general agreements and disagreements which formed the basis of the general reports.

The result of this novel approach, in Schlesinger's, own words, is a great improvement on the customary approach of mere "*compilation* and *juxtaposition* of the various solutions found, without proceeding to the further step of comparison."[22] This step, according to Schlesinger, involves at the very least the identification and formulation of elements of similarity as well as dissimilarity. Dilating on the difficulties that the experts had to face in this process of comparison, Schlesinger mentions that in order to avoid "well-known generalities" about the differences between common law and civil law the experts had to educate each other on the history, the sources, the classificatory schemes and other general features of the legal systems under consideration. They tried to cut across the "law-fact dichotomy" that existed in some legal systems. And many other such hurdles.[23]

Any assessment of the contribution made by Schlesinger and associates as outlined above must begin by stressing the fact that common core research not only facilitates the evolution of the general principles of law, envisaged by the statute of the ICJ, but also helps promote better understanding in the formation of treaties, charters of international organizations and contracts between individual governments, foreign investors, and even

20. *Ibid.*, 2.
21. *Ibid*, 30.
22. *Ibid.*, 2.
23. *Ibid.*, 55-58.

contracts between private parties. Furthermore, the Hague Convention of 1964 relating to Uniform Laws on the International Sale of Goods call for gaps to be filled, provisions to be interpreted, and usages to be determined by reference to comparative data. Common core research is an important step towards facilitating the development of international law in these many areas.[24]

Also, common core research may contribute to the development of national legal systems. With a vast number of newly freed Afro-Asian countries looking out for assistance from developed legal systems for the formulation of their own, common core will assuredly have seminal significance. It would be wasteful to ignore the legal experience and thinking of the rest of the world, particularly those parts which have similar economic and social structures and have wrestled with the same problems as the emergent nations.[25] Max Rheinstein reviewing the work of Schlesinger and associates also affirms its importance to the practitioners of international law, and goes on to add that it is "likely to be of even great practical importance for the ordinary commercial practice of law when it transcends national boundaries."[26]

Though most of the reviews of the *Formation of Contracts* reassure the editor in the negative as far as his agonizing question, namely, "did the authors merely demonstrate the obvious?", and concede that the study did demonstrate unexpectedly large areas of agreement between the world's legal systems as well as many unexpected disagreements "intertwined in subtler and more complex ways than had been surmised",[27] nearly all have a word or two about the time-consuming process. "Ten years of conferences" and the enormous amount of time and expenses, are a continual refrain of all reviews. The real agonizing question is asked thus: "Can there be real hope, then, that even one whole area of private law can ever be fully examined for its common core with the high standards set by the present study? And would not any project failing to live up to these standards easily do more harm than good?"[28] J.A. Weir reviewing in the *Cambridge Law Journal*, though emphasizing the "great gains", has the following final comment:

> "But it is still not likely to be followed very often. It is enormously expensive—the Foundation Fathers are the Mothers of Invention. It takes a vast amount of time—this web was as long a-weaving in Ithaca as it took Odysseus to get back there. One wonders whether these huge co-operative undertakings in comparative law (and there are even bigger ones, afoot or ahead) are worthwhile. We are not, after all, going to the moon, or doing anything useful like that. So far as the present book is concerned, however, the grandeur of the result justifies an effort of such magnitude."[29]

Frederick Davis of the New York Bar has a studied comment on another level. "The theory", he says, "that movements towards the establishment of core principles of extranational private law can contribute to world

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24. See review of *Formation of Contracts*, 54 *Cornell L. Rev.*, 482 (1968-69).
25. See review of *Formation of Contracts*, 37 *Fordham L. Rev.* 149 (1968).
26. See 36 *U. of Ch. L. Rev.* 452 (1968-69).
27. See Schlesinger's assertion to this effect, *op. cit.* at 41.
28. See A. A. Ehrenzweig's review in 56 *California L. Rev.* 1515 (1968).
29. 27 *Cambridge L. J.* 124 (1969).

political stability is at war with the views of a number of eminent and perceptive scholars who in recent years have made invaluable contributions to the epistemology of international law."[30] Though the objectives of the Cornell Project were "more limited and less exciting than some of the claims espoused by Jenks",[31] he points out, the possibilities of making a common core of legal principles acceptable to all are remote. For, "It is one of history's many paradoxes that at the very moment science and technology began to 'shrink' the world, legal developments shifted from a centripetal to a centrifugal trend."[32]

It is idle to add anything to the above commendation or criticism of the idea of common core research, except, perhaps, to say that to the uninitiated it appears as though the aims of, and obstacles to, this method of research seem to be as formidable as those of the grandiloquent dream of unification—with one improvement, *viz.*, the political difficulties of changing the hearts of the rulers to espouse the unified law is abandoned in common core research. As regards its adoption in India, it would, of course, be naive to venture into speculation.

30. Frederick Davis, "Comparative Law Contributions to the International Legal Order : Common Core Research," 37 *George Washington L. Rev.* 625 (1969).
31. The reference is to Wilfred C. Jenks, *The Common Law of Mankind* (1958).
32. Davis, *op. cit.*, 629.