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UNIFICATION OF AVIATION LAW IN THE WESTERN HEMISPHERE*

S. A. BAYITCH**

INTRODUCTION

As an abstract proposition the idea of legal unification is attractive in itself. It expresses the ideal of equality under equal law, thus satisfying the longing of men for equal justice for all. This ideal, of course, must be exposed to the realities of life. The significant principle of uniformity may shape the laws within one jurisdiction or country, but fail when applied to two or more different jurisdictional units or countries. As a sovereign unit, each country is vested with the power to enact its own laws according to its own policies. Thus, even legal systems with a common origin suffer under the inherent tendency to drift apart rather than to converge. This divergence is the result of numerous influences and can readily be seen in the various state interpretations of the common law. One important influence, of course, is the diversity in governmental policies which follows different political doctrines to reach different legal solutions to socio-economic problems. Also, society's development frequently varies from country to country. Finally, local propensities to be original in order to appear more independent, coupled in some instances with doctrinaire idiosyncrasies, lead to variations on the same legislative theme. Thus, only a planned counteraction pressing for a rational unification can overcome such diversifying factors.1

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I. Why Unify?

Any plan of unification, consequently, must find a workable balance between the ideal of uniform laws for all and the divisive forces in life. Such analysis brings into play positive as well as negative factors. Following the guidelines of one of the most experienced institutions for unification, the National Conference of Commissioners on Uniform State Laws, positive criteria require that: (a) there must be an "obvious reason and demand" for unification so as to make its preparation a "practical step toward uniformity . . . or at least toward minimizing its diversity"; (b) there must be a "reasonable probability that the act when approved will be accepted and enacted into law by a substantial number of jurisdictions"; (c) the aim of the planned unification must be the replacement of laws which "tend to mislead, prejudice, inconvenience or otherwise adversely affect the citizens of the states in their activities or dealings in other states or with citizens of other states moving from state to state." Negative factors to unification, are (a) "entirely novel [subjects] with regard to which neither legislative or administrative experience is available"; (b) matters "controversial because of disparities in social, economic or political policies or philosophies of the states"; and (c) matters of "purely local or state concern and without substantial interstate implications unless conceived and drafted to fill emergent needs or to modernize antiquated concepts."

It is not surprising to find that aviation law, like admiralty law and law merchant, has shown from its inception a trend toward international unification. In areas where contacts with foreign jurisdictions are few as, for example, in matters of real property or domestic relations, the law of another jurisdiction is, in most instances, of no interest to persons involved since the same socio-economic phenomenon will run its course within the same jurisdiction, satisfactorily regulated by one set of laws. However, where operations stretch through more than one jurisdiction, particularly in trans-national matters like navigation, commerce and aviation, a number of varied coexisting legal systems are called upon to regulate such operations. As a consequence, activities carried on through a number of different jurisdictions are exposed to the application of different laws, substantive and procedural, which may affect one and the same operation at its various stages in different ways. This variation coupled with unavoidable uncertainties is bound to hamper, if not prevent, a predictable or safe winding up of multi-legal-systems operations.


2. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 324 (1962).
The early attempts to regulate public law of aviation, e.g., by the Paris Convention in 1919, or its late counterpart in this Hemisphere, the Havana Convention on Commercial Aviation of 1928, demonstrate the trend in aviation law towards international unification. However, there was need for further international unification in the areas of conflict as well as substantive law. This need is reflected in article 282 of the Codigo Bustamante of 1928, articles 26 through 28 of the Convention on Commercial Aviation in Havana, 1928, and the Montevideo Conventions of 1940.

All this illustrates that the idea of unifying aviation law in this Hemisphere is not novel. In view of this, the present study will attempt to present a broad analysis of problems underlying unification, and will bypass premature solutions as well as minute questions. It is hardly appropriate, if not impossible, to discuss a detailed arrangement of a future interamerican aviation code before some of the fundamental questions are properly identified, adequately discussed,


5. Text in 1 Scott, The International Conferences of American States, 1889-1928 325 (1931); also in 4 Hudson, International Legislation 2283 (1931). The Code has been ratified by Bolivia, Brazil, Chile, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Haiti, Nicaragua, and Venezuela, in many instances with far reaching reservations.


7. The Fifth Conference of American States (Santiago, 1925) has urged “draft laws and regulations [on commercial aviation] the adoption of which is to be recommended to all American States,” 1 Scott, The International Conferences of American States, 1889-1928 277 (1931). On the unofficial aviation conference in Santiago in 1916, see Comision Aviacion Comercial, El Desarrollo del Derecho Aereo (P.A.U., 1927); also York, International Air Law in the American Republics, 3 J. Air L. & Com. 411 (1932). The Interamerican Technical Aviation Conference in Lima, 1937, recommended the study of unification of legislative standards, including the drafting of an aviation code, 5 For. Rel. 1937, at 198 (1954); Actas y Reglamentos de la Primera Conferencia Tecnica Interamericana de Aviacion (Lima, 1937); 9 J. Air L. & Com. 422 (1938). For a survey see BAUZA ARAUJO, UNIFICACION LEGISLATIVA, DOCTRINAL Y JURISPRUDENCIAL IBEROAMERICANA EN DERECHO AEREO (Salamanca 1964) (hereinafter cited as BAUZA ARAUJO).

and realistically solved so as to be acceptable to the number of republics of this Hemisphere willing to cooperate.  

Past experiences gained from interamerican efforts toward legal unification need not discourage serious explorations of an interamerican unification of aviation law; rather, they may be used as helpful warnings. Although inspired conferences have taken favorable positions and many conventions have been drafted and signed, little has been achieved in terms of operative law. Nevertheless, there can be no doubt about the latent interest in unification as well as the willingness to do something about it.

II. DEGREES OF UNIFICATION

Once the premise has been accepted that unification of aviation law is a desirable and workable goal, the degree of such unification must be considered. This question includes two aspects: first, what specific matters within aviation law shall be included in the planned unification; and second, the degree to which the planned unification should be pressed. The second aspect will be presented in this section, while the first aspect will be discussed later.

A decision on the degree to which a planned unification should be pressed may be made from three simple alternatives: a most complete and detailed unified code, a unification of areas selected as most needed and promising, or an agreement on underlying general rules leaving the participating countries a free hand to adapt the rules to local circumstances. Which alternative to choose presents a complex question. In aviation law, as in other areas considered for international unification, the results will depend on the interplay of two factors: the intensity of the desire generated by the need or other interest for unification as against the inherent inertia favoring the status quo and, in many instances, parochialism tainted with doctrinaire overtones.

Frequently, attempts to achieve too much too quickly results in irreparable harm while modest undertakings become the first steps along a long, difficult, but more successful road. Tested against experiences in the Hemisphere, it seems that attempts at complete interamerican or international unifications have had little practical success. The well drafted Bustamante Code earned an unimpressive number of ratifications, many of them emasculated by complete reser-

vations in favor of domestic law; and the Montevideo conventions of 1940 received, in spite of their remarkable qualities, only a disappointing response. The ratification of international unifications limited to specific matters is equally unpromising, as shown by the lack of ratifications, on the part of Latin American republics, of the Warsaw (1929) and Geneva convention (1948). International acceptance of basic principles underlying aviation law was not even attempted; however, the method is deeply imbedded in Spanish legislative techniques and might have some appeal.

III. WHAT TO UNIFY

Whatever degree of unification may be adopted, namely a full fledged regulation of all aviation law or parts thereof, or only agreement on basic principles, the question still remains as to the subject-matters to be included.

The aviation codes of Latin American republics cover all problems inherent in, or connected with, aviation. Without listing the areas traditionally covered in these aviation codes, it may be assumed that a unification of aviation law, if limited to Latin American countries and Spain, will tend to adopt the same systematic arrangement and cover the same matters as they are presently contained in their codes. However,

11. BAUZA ARAUJO 12.
12. 49 Stat. 3000. Ratified by Argentina, Brazil, Cuba (with reservations), Mexico, and Venezuela; continues in force in Jamaica and Trinidad-Tobago. Applicable to British as well as the Dutch and French dependent areas in the Caribbean. Adherence to the Warsaw convention by ratifying the Hague Protocol (1955) under Art. XXII (2) is not accepted by the United States; letter to this writer from the Legal Adviser, Department of State dated May 6, 1964, states that the Warsaw Convention "is not in force between any country which is a party to the Protocol and any country which is a party to the convention only." This applies to Ecuador and El Salvador having ratified only the Hague Protocol. Paraguay claims to be a member to the Convention (PRIMERAS JORNADAS 1960) but does not appear in the official list. For a discussion and bibliography see BILYOU 125.
14. E.g., the Spanish Ley de bases de la navegación aerea (1949), HERRERA Y ESTEBAN, LEGISLACIÓN AERONAUTICA ESPAÑOLA (1951).
17. As indicated by the CODIGO AERONAUTICO AMERICANO: ANTIFROYECTO ARGENTINO.
in case the United States, with or without Canada, should be considered for inclusion into an interamerican unification, then it must be kept in mind that in both countries only part of aviation law is codified in federal enactments and thus domestically unified, while the remaining matters, practically the prevailing mass of private aviation law, remains within the jurisdiction of the states or provinces, respectively, regulated there by local statutory as well as case law. Leaving Canadian aviation law outside of this discussion, it must be pointed out further that the Federal Aviation Act of 1958 deals primarily with administrative matters: the Civil Aeronautics Board, its organization and powers; air carriers economic regulations (certificates, including permits to foreign carriers); tariffs and rates; transportation of mail; consolidation and mergers; loans, methods of competition and legal restraints; nationality and registration of aircraft and interests therein; safety regulations; aircraft accidents; criminal law of the air; administrative procedures and some aspects of insurance, to mention only the more significant areas of the Act. Comparing this list with topics included in the modern Latin American aviation codes, it is apparent that the latter are far more comprehensive, particularly in the area of private law (e.g., charter, labor law, liabilities) while they lack, among others, provisions regarding rates, monopolies and fair competition. In view of such extensive differences in coverage it is not easy to indicate what matters should be considered for inclusion in an interamerican unification. Idealists would urge a most complete coverage while pragmatists would be satisfied with a selection of matters whose practical importance would encourage efforts toward unification, for example, titles, contracts (passenger, charter) and liabilities. Lower on the list would be matters of jurisdiction and procedure, of criminal law and, lastly, of administrative law and procedure.

As long as the underlying substantive, jurisdictional, and procedural law of aviation varies from country to country, and a reasonable degree of uniformity in the most vital areas has not been reached, the nearest remedy seems to be the unification of conflict rules, i.e., private international law of aviation. By unifying these rules, the controlling law; substantive as well as jurisdictional and procedural, may reach a remarkable degree of uniformity. Judging by the number of interamerican conflict rules applicable to aviation, past achievements are

(Cordoba 1962); VELLARAN, POSSIBILIDAD Y CONVENIENCIA DE UN CODIGO DE AERONAUTICA LATINOAMERICANO, in PRIMERAS JORNADAS 395; TOLLE, POSSIBILIDADE E CONVENIÊNCIA DE UM CÓDIGO AERONÁUTICO LATINOAMERICANO, id. at 400; RODRIGUEZ JURADO, POSSIBILIDADE E CONVENIÊNCIA DE UNIFICAR LA legislación AERONÁUTICA LATINOAMERICANA, id. at 423; ANDINO, APORTE PARA LA UNIFORMIDAD DE LA LEGISLACIÓN AERONÁUTICA LATINOAMERICANA, id. at 466.

18. VALLADAO, PRIVATE INTERNATIONAL LAW, AND CONFLICTS LAW, LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA (1961); SAPORTA, CONFLICTOS DE LEYES EN MATERIA DE DERECHO AERONÁUTICO, 1 REVISTA DEL INSTITUTO DE DERECHO AERONÁUTICO 305 (CORDOBA 1952); MILDE, CONFLICT OF LAWS IN THE LAW OF THE AIR, 11 MCGILL L.J. 220 (1965).
attorney when she is not aware that it may be necessary.\(^5\) Indeed, it has been held that the prospective husband is under an affirmative duty to advise his intended bride to obtain counsel whenever it may be of real assistance to her in deciding whether to enter into the antenuptial agreement, and if she is denied the opportunity to seek independent advice, the court may be forced to conclude that irrespective of the lengths to which the husband has gone to disclose his worth, undue advantage was taken of the wife.\(^6\) Generally, however, the fact that the wife is not represented by independent counsel or given the opportunity to obtain an attorney will not be fatal to the validity of the agreement if the nature and effect of the contract are fairly and honestly explained to her by her prospective husband or by his attorney.\(^6\)

Although the availability of counsel is perhaps the single most important factor considered by the courts, most agreements have been attacked on the ground that the prospective husband failed to disclose to his intended bride facts concerning the nature, extent and value of his property. In this connection, the contract itself may be of great value in defending against a challenge on the ground of nondisclosure. First, if the agreement contains an itemization of all property owned by the husband and a reasonable estimate of the value of each item, the wife will be held to have possessed sufficient knowledge of her intended husband’s estate.\(^6\) A separate instrument to the same effect is equally satisfactory for this purpose.\(^6\) Disclosure of this sort, provided it is accurate and fairly represents the husband’s total worth, would seem to be the most satisfactory means of defending the agreement’s validity. However, when it is remembered that the purpose of disclosure is to enable the prospective wife to make an intelligent judgment before relinquishing the property rights which accrue to her on marriage, it is apparent that a detailed itemization is not imperative. Thus, an agreement will be sustained if it recites the husband’s total worth, provided the figure used is a reasonably accurate approximation of his estate.\(^5\)

Second, a general recital in the agreement to the effect that both parties have been fully informed of the other’s property has been held contract was executed. See also Johnson v. Johnson, 140 So.2d 358 (Fla. 2d Dist. 1962) (wife offered counsel but refused); Levy v. Sherman, 185 Md. 63, 43 A.2d 25 (1945).

\(^5\) In re Gillen, 191 Kan. 254, 380 P.2d 357 (1963) (wife advised to obtain an attorney; agreement upheld); Batleman v. Rubin, 199 Va. 156, 98 S.E.2d 519 (1957).


\(^5\) Parker v. Gray, 317 Ill. 468, 148 N.E. 323 (1925); Slater v. Slater, 310 Ill. 454, 142 N.E. 177 (1923); In re McCready, 365 Pa. 401, 75 A.2d 595 (1950).


\(^5\) In re Devoe, 113 Iowa 4, 84 N.W. 923 (1901); In re Ward, 178 Kan. 366, 285 P.2d 1081 (1955); Harlin v. Harlin, 261 Ky. 414, 87 S.W.2d 937 (1935); In re Emery, 362 Pa. 142, 66 A.2d 262 (1949).
to constitute prima facie evidence that the requirement of full disclosure has been satisfied. A recital of this nature has the effect of shifting the burden to the wife to show fraud, misrepresentation or concealment by the husband in affirmative terms. However, such a recital would seem to be of little effect when it can be shown that the intended wife did not read the agreement and was unaware that it contained the recital on which reliance is placed.

Ideally, then, the task of sustaining the validity of an antenuptial agreement can be eased substantially by a disclosure within its four corners of the value of each party's estate. However, such concrete evidence is not required and an agreement may also be sustained by means of extrinsic evidence showing that the prospective husband orally disclosed the extent of his property or that his intended wife knew from independent sources of the approximate value of his estate.

Oral declarations by the prospective husband concerning the extent of his property are governed by the identical standards which apply to written declarations contained in the antenuptial agreement or other instrument. Thus, the husband must disclose not only the particular property owned by him, but also its approximate value, so as to enable his intended wife to make a reasoned judgment concerning the agreement she is about to enter. As always, the test is whether the disclosure made was full, complete and frank, or conversely, whether the husband's conduct was tainted by fraud, misrepresentation or concealment.

At this point, it should be apparent that when a confidential relationship exists between the parties, the burden rests on the husband to inform his prospective wife of his property, rather than on the wife to

57. Megginson v. Megginson, 367 Ill. 168, 10 N.E.2d 815 (1937); Parker v. Gray, 317 Ill. 468, 148 N.E. 323 (1925); In re Snyder, 375 Pa. 185, 100 A.2d 67 (1953); Smith's Appeal, 115 Pa. 319, 8 Atl. 582 (1887).

But see In re Clark, 303 Pa. 538, 154 Atl. 919 (1931), in which a recital that both parties were cognizant of the legal effect of the agreement was held insufficient to preclude inquiry by the court when the contract failed to state that the intended wife knew the value of the husband's estate; Baker v. Baker, 24 Tenn. App. 220, 142 S.W.2d 737 (1940), holding that a recital to the effect that the prospective wife was informed of her husband's estate could not overcome the presumption of fraud arising from a disproportionate provision made for the wife.

58. See cases cited in note 57 supra.


However, if there is a provision under which the wife is to take a designated percentage of the husband's total estate, lack of detailed disclosure is immaterial, since the larger his estate, the greater will be her share under the agreement. In re Knippel, 7 Wis. 2d 335, 96 N.W.2d 514 (1959).
encouraging. The Bustamante Code of 1928 as well as the Montevideo conventions of 1940 regarding international terrestrial commercial law and commercial navigation indicate at least an intensive interest in this area of unification. However, contrary to such awareness for the private international law of aviation, domestic aviation codes in force in Latin America have only a few, if any, such provisions. Generally there are no conflict provisions related to contracts or liabilities arising from air transportation. The only exceptions seem to be the 1963 aviation code of Panama, article 198, and the official draft for the 1962 aviation code of Costa Rica. The Panamanian Code refers to liability of domestic as well as foreign carriers engaged in international air transportation and to international conventions ratified by the Republic. In case such conventions do not apply, the code refers simply to “this law and other applicable laws of the Republic.” A more sophisticated solution has been adopted by the official 1962 Costa Rican draft for an aviation code.

The civil liability of domestic and foreign air carriers engaged in international air transportation shall be governed by the provisions contained in this chapter and outside of this by international conventions and in case there should be none, by other [domestic] laws whenever the accident and damages occur within the national territory.

This provision is implemented by article 246 providing as follows:

In case of a foreign international air carrier damages caused to passengers who have purchased their tickets in Costa Rica will be governed by this law, regardless of whether the place of departure or that of destination is in Costa Rica or abroad and regardless of the place where the damages occurred, unless the application of the respective foreign law would be more favorable to the injured parties.

In this connection it may be added that as recently as 1964 the Federal Aviation Act was amended by an interstate conflict rule subjecting the validity of conveyances recordable under the same Act to the law of the jurisdiction “in which the instrument was delivered, irrespective of the location or the place of delivery of the property which is the subject of such instrument.” It must also be noted that significant changes are under way in interstate conflict law governing claims arising from air accidents.

Compared with the domestic and international conflicts rules of both the civil and common law of property, contracts or torts, statutory provisions dealing with criminal law of the air are much more elaborate, apparently not only because of a need for such rules but also because of the challenge to doctrinaires to which conflict problems involving everyday contracts or torts appear less challenging than exciting criminal cases. These latter questions have received a surprising amount of interest. As a consequence, copious preparatory materials are available. In this connection it must not be overlooked that the 1963 Tokyo Convention Regarding Offenses and Certain Other Acts Committed on Board Aircraft has, to a rather limited extent, dealt with jurisdictional issues respecting criminal cases.

In view of the apparent interest in conflict problems of aviation law, an interamerican unification of this area may be suggested as an intermediate stage, to the total unification of aviation law in the Western Hemisphere. This preparatory stage would be based on an integration of revised provisions of the Bustamante Code of 1928 and the Montevideo conventions of 1940 as well as conflict rules contained in the 1929 Warsaw and the 1948 Geneva conventions. An example cautioning a disregard of the Geneva convention appears in the 1962 Argentine draft for the American Aviation Code. Even though the draft refers in annotations to the Geneva convention, its provisions, e.g., article 56, patently violate the basic principles of the Geneva convention and in doing so, overlook the fact that the convention has been ratified not only by Argentina, but also by a number of other Latin American republics, among them Brazil, Chile, and Mexico.

IV. AREA OF UNIFICATION

Any attempt to unify a branch of law through international cooperation must face two problems: one, what matters to include in the planned unification, a question already discussed; and the second, what


geographic area shall be marked off for the planned unification or, in other words, what countries should be considered as prospective participants in the plan.\(^{25}\) In the case of the latter question past efforts toward unification have already indicated possible alternatives. In a general way, they fall into two groups: one, limiting the participating countries to those of the Western Hemisphere, and the other, reaching beyond the Western Hemisphere.

Starting with the first alternative, it may be said that some of the widely accepted plans include only Latin American countries\(^ {26}\) of Middle and South America and the three similar countries of the Caribbean, Cuba, Dominican Republic, and Haiti, but exclude dependent areas in and around the Caribbean, (those of the British, Dutch and French) as well as the recently independent nations of Jamaica and Trinidad-Tobago. A plan limiting unification to Latin American countries has been adopted, for example, at the meetings of the Interamerican Air Transport Confederation (Confederación Interamericana de Transporte Aereo, CITA) in 1960 in Buenos Aires, and repeated at the 1963 conferences in Quito and Mexico.\(^ {27}\)

Within the Latin American area less ambitious plans have been undertaken or advocated. The Central American republics and Panama proudly display a degree of unification in aviation law unprecedented in the Hemisphere. Another plan urges regional unification for the Plata countries.\(^ {28}\) Finally, developing common markets in Latin America may generate actions to unify among the participating countries the law of transportation, including that by air.\(^ {29}\)

The other possibility, still limiting the prospective participating countries to those of the Western Hemisphere, considers the unification to include the United States. This plan was endorsed, for example, by the Regional Conferences of Aviation Law (Reunión Regional de Derecho Aeronáutico),\(^ {30}\) particularly at the 1960 meeting in Montevideo, recommending that "governments of the countries of the American Continent undertake efforts toward the unification of an American Aero-


\(^{26}\) Bauza Araujo 23; Bauza Araujo, _Las Reuniones Regionales de Derecho Aeronáutico de Punta del Este y Rivera_ 16 (Montevideo 1959) reporting that the meeting at Rivera in 1959 urged the need for uniform Latin American aviation legislation.

\(^{27}\) Rodríguez Jurado, _El Código Aeronáutico Rioplatense_, in _Estudios Jurídicos en Memoria de Eduardo J. Couture_ 623 (Montevideo 1957).


nautical Code in order to unify as soon as possible the aviation legislation of the American Continent. The following 1962 Bogota Conference established a Committee of Jurists to meet in Cordoba and prepare a draft for an American aviation code. The Committee met in 1963 and discussed a draft submitted by Argentine air law specialists without reaching a final conclusion.

It may be added for the sake of completeness that Canada is usually disregarded in Hemisphere-wide unification plans. In terms of factual problems her inclusion raises no problems different from those encountered in regard to the United States. Of course, a complete Hemispheric unification should not overlook the non-Latin independent countries of the Caribbean, i.e., Jamaica as well as Trinidad-Tobago, nor should it sidestep international questions involved in normalizing aviation problems in relation to the British, Dutch and French dependent areas in and around the Caribbean.

The other alternative to the question of which countries should be included in any unification of aviation law would reach beyond the Western Hemisphere and include also extra-hemispheric nations. This may be done in two ways, one narrower, and the other broader. The former is represented by the plan to include Spain as an expression of the Ibero-American community and from a practical point of view suggests the new Spanish aviation code as the basis for discussion. The idea, reflecting sentimental motives rather than practical considerations, prevailed at the 1963 conference at Salamanca (Jornadas de Derecho Aeronautico y del Espacio) and resulted in the creation of an Ibero-American Institute of Aviation and Space Law outside of Latin America, i.e., in Madrid. The broader solution, of course, is the omnipresent world-wide unification of aviation law as represented by the efforts of the International Civil Aviation Organization as well as in a number of international aviation conventions: Warsaw (1929), Rome (1933, 1952), Chicago (1944) continued in Geneva (1948), and Tokyo (1963). This alternative for unification, always open to Latin American republics, unfortunately has created little interest.

A brief evaluation of these alternatives would indicate that a uni-

31. Bauza Araujo 28; the Conference further recommended “a further study of international conventions in force in order to consider the possibility of their adoption” as well as expressed the readiness of the participating countries to “study and enact, through their respective legislations, general principles of international law of aviation,” 5 (10) REVISTA BRASILEIRA DE DIREITO AERONAUTICO 64 (1961).
34. Guldiman, La Methode de Travail du Comite Juridique de l'O.A.C.I., 14 REVUE FRANCAISE DE DROIT AERIEN 1 (1960); Tapia Salinas, Caracter Internacional de los Normas Aereas y Organizacion Internacional de la Aviacion Civil, 1 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 437 (1948).
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Filiation limited to Latin American countries promises less difficulties in view of their civil law traditions and close affinity of their modern aviation codes. However, attempts to plan a unification acceptable to one or both of the common law countries of the Hemisphere, the United States and Canada, while more responsive to the needs of interamerican aviation, face difficulties inherent in the differences underlying their legal systems. In view of the present position of the United States aviation industry, both in terms of manufacture and carriage, real progress will be made only on a continent-wide basis.

It may be added that the myth of insurmountable differences has become an accepted belief among many Latin American jurists even though there is no one study which would, by comparing the basic aviation principles prevailing in both legal systems, support this position. On the other hand, a unification limited to Latin American countries would be of considerably less value in view of the already prevailing uniformity of their fundamental legal concepts as well as the close similarities revealed in their modern aviation codes, without minimizing, of course, the nuisance value of doctrinaire reluctances to accept pragmatic solutions. An example warning of such difficulties was evidenced at the otherwise impressive sessions of the Primeras Jornadas Latinoamericanas de Derecho Aeronautico (B.A., 1960) where the discussion of unification turned into a doctrinaire dispute over the private versus public law of aviation and its autonomous nature.

In regard to the United States it must be pointed out that presently there is no movement under way in favor of any type of interamerican unification of aviation law. On the contrary, the very adherence to a partial universal unification in the Warsaw Convention is being questioned. To properly evaluate this attitude, it must be taken into consideration that here private law governing aviation, including conflict law, is in important areas, e.g., contracts, torts primarily state law and thus not nationally unified. Persistent attempts in the area of aviation law on the part of the National Conference of Commissioners on Uniform State Laws have met with little success. However, this lack of domestic uniformity is, to some extent, counterbalanced by the fact that aviation law, considered inherently an interstate, if not international, activity, falls within the legislative powers of Congress. Relying on these powers, Congress has enacted the Civil Aeronautics Act of 1938, later revised to become the present Federal Aviation Act of 1958. This Act has unified, among other matters, the law of registration of titles as well as other in-

36. See note 17, supra. Primeras Jornadas Hispanoamericanas de Derecho Aeronautico, (Salamanc 1960); see 9 (14) REVISTA DEL INSTITUTO DE DERECHO AEREO 179 (Cordoba 1960).
38. Primeras Jornadas 43.
terests in aircraft, supplemented recently by section 506, a uniform, even though only interstate, conflict rule determining the law applicable to conveyances. Prior to this, in 1961 the Act was amended by extensive provisions dealing with the substantive, conflict and procedural criminal law of the air.  

In spite of some degree of reluctance imposed by its domestic federal structure, the United States has shown constantly a cooperative attitude towards the international unification of aviation law by ratifying a number of international aviation conventions, among them the Warsaw, Chicago, and Geneva conventions, in addition to a great number of bilateral aviation agreements. However, there is a rather cautious attitude towards ratifying conventions which go beyond basic or necessary matters. In view of this, it may be assumed that the United States would cooperate in an interamerican unification dealing with precise basic legal questions rather than in a project dedicated to an overall unification for the sake of an abstract ideal. Along this line, it may be expected that the United States would be interested in matters concerning titles and other interests in aircraft, rather than questions of liabilities arising from air transportation that go beyond the few principles included in the Warsaw Convention or matters affecting judicial jurisdiction. This disinterest in an overall unification is evidenced by the opposition to the Rome Convention and the recent questioning of the value of the Warsaw Convention including difficulties encountered in the application of its article 28.

In conclusion, it seems appropriate to caution against a wide-spread self-deception frequently found in attempts at unification, namely including in the unifying act what already is uniform and conveniently glossing over controversial matters. The real aim of unification is not to make an inventory of rules already uniform but to seek agreement where they differ. An example of such techniques is the Codigo Aeronautico Americano: Anteproyecto Argentino (1962).

V. HOW TO UNIFY

Movements toward unification of a given area of the law have developed two principal methods. One is that of working out a model


uniform act to be submitted to participating countries for adoption as domestic legislation, a method used on the interstate level in the United States. In interamerican relations, this method has proven effective in Central America where the periodical conferences of the Directors of Civil Aviation have achieved a significant uniformity of aviation codes, the most recent being that of Panama in 1963. Another method is that of drafting uniform provisions as international conventions to be ratified by participating countries as treaties and, according to their particular constitutional provisions, transformed into domestic law. Such international conventions may regulate a particular topic, e.g., liability arising from international flights (Warsaw), or recognition of interests in aircraft (Geneva) or it may contain a complete aviation code as does, for example, the 1962 Argentine draft for the Codigo Aeronautico Americano, providing in article 1 that "This code regulates civil aviation in the territories of the countries which ratify it."

A composite method is one which, at least de facto, further limits unification. It is frequently used in Latin America, where provisions contained in international conventions or even in mere drafts are included directly into domestic aviation codes without previous ratification. The reason for this method is not easy to guess: it may be that the process of ratification appears to be too slow or cumbersome, or that these countries do not want to be internationally bound by ratification and thus prevented from making substantial changes or adjustments of the treaty provisions.

The better method seems to be unification by treaties. Such a method makes rules contained therein not only applicable as the law of the land but, at the same time, applicable as international obligations. Consequently, their breach becomes a breach of an international rule, thus adding to available internal remedies for breach the sanctions established by international law for such treaty violations. Moreover, treaty rules supersede, under constitutional rules of most of the countries of the Hemisphere, domestic statutory law and thus are assigned a higher place in the hierarchy of the law of the country. In this connection, the question of reservations will undoubtedly appear. Judging from the open reservations to the Bustamante Code, the effect of a uniform treaty law will be insignificant unless reservations are limited to provisions expressly designated and dealing with matters which may safely be left to local regulation.

There are presently unifying forces at work, even though not the

44. See note 17, supra.
46. Muci Abraham, Los Conflictos de Leyes y Codificación Colectiva en América 34 (Caracas 1955).
consequences of a particular plan of unification. One of them is the widespread scope of technical, including legal, advice available from international organizations, particularly from the International Civil Aviation Organization and the International Labor Organization. The action by the former was instrumental, for example, in the largely similar aviation codifications of the Central American republics. Another unifying force, equally unplanned, arises from the inter-country influences persuading Latin American republics to consult and, in many instances, adopt enactments in force in sister republics. This practice has resulted in similar, if not identical, regulations of large areas of recently enacted aviation law throughout Latin America. This may be considered, at least for the time being and aside from provisions contained in treaties or draft treaties, the most significant unifying force.

VI. THE PROCESS OF UNIFICATION

The process of unification is a complex operation when it affects different legal units within one sovereignty. It becomes decidedly more complicated when unification involves a number of independent countries. Barriers of sovereignty grow even higher when participating countries belong to different legal systems, in the present case to common and civil law. In some cases additional difficulties arise from the federal structure of the participating countries which unites a number of largely independent jurisdictions (i.e., states), as is the case in Mexico and in the United States. Therefore, unification is not an area for amateurish forays. Instead, various stages through which a serious effort for unification must pass in order to have a reasonable chance for success must first be identified.

In a general way, four stages may be distinguished: the first, exploratory; the second, preparatory; the third, adopting; and the fourth, enforcing. The first or exploratory stage is designed to settle preliminary questions, among them the crucial one, whether or not to unify aviation law, a question presently not even asked. These and other preliminary questions must be considered in the light of the realistic factors identified by the National Conference of Commissioners on Uniform State Laws and summarized above. The preparatory stage shall supply a comprehensive and reliable picture of aviation law in force in the participating countries, with emphasis on matters to be included in the uniform act. From these comparative studies areas of agreement and disagreement will be identi-

47. Mateucci, The Method of the Unification of Law, 2 UNIDROIT, UNIFICATION OF LAW Yb. 3 (1957).
fled and solutions, either adhering to the traditional views or suggesting new ones, will emerge as preparatory to a preliminary draft.

After learned institutions and the aviation industry, as well as cooperating governments and international organizations, if any, have had an opportunity to voice their opinions and submit their suggestions, a conference of experts from governments, science (law and engineering) and industry, if possible under the auspices of an international organization, e.g., ICAO or OAS, shall convene to work on a final draft. Once completed, the draft will inaugurate the diplomatic phase, preliminary negotiations to be followed by final action of an international conference, if possible under the auspices of one of the international organizations concerned.

This is not the end of the process; guarantees for the proper enforcement of the uniform act must also be provided. They include its ratification and application. In regard to ratification, an impressive number of Hemispheric republics must be required to ratify before the uniform act takes effect. To secure an effective and uniform application throughout the participating countries, it certainly would be ideal to have an inter-American court charged with this task. For the time being, a simple exchange of information (cases, discussions, publications) may be attempted as well as periodical diplomatic conferences to consider the working of the uniform act with an eye on improvements by amendment.

VII. CONCLUSION

It is disappointing to find how disorganized and, in many instances, ill conceived some of the attempts at unification of aviation law in the hemisphere have turned out. Even if well intentioned, they follow no established plan and rush into drafting without having completed any of the preliminary requirements for a sound and successful work. Therefore, it seems unavoidable that unification must start from the beginning. It certainly has a long way to go. The only hope to reach the goal is to start in the right direction with the right foot.


50. Segundo Congreso Hispano-Luso-Americano, Sao Paulo, 1953, suggested a discussion on the establishment of an “international jurisdiction to decide conflicts arising from the application of treaties regulating air transportation,” 1 ANUARIO HISPANO-LUSO-AMERICANO DE DERECHO INTERNACIONAL 127 (1959); Diron, Towards a Uniform Interpretation of Private Air Law Conventions, 19 J. AIR L. & COM. 423 (1952); Cavalcanti, Lei Uniforme: Jurisprudencia Uniforme em Direito Aereo Internacional, 1 REVISTA BRASILEIRA DE DIREITO AERONAUTICO 17 (1951); Riese, Une Jurisdiction Supranationale pour l'Interpretation du Droit Unifie, 13 REVUE INTERNATIONALE DE DROIT COMPARE 717 (1961). A draft to establish an international court for adjudication of private disputes arising from international aviation conventions was submitted to the International Law Association at its 46th Conference in Edinburgh, (1954 REPORT 290). The Association also discussed a draft convention regarding enforcement of judgments in aviation matters (1954 REPORT 302) and taken up at the following conference in Dubrovnik (1956 REPORT 176).